

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 KICKSTARTER, INC.,

5 Plaintiff,

6 v.

7 11 Civ. 6909 (PAC)

8 PAN FUNDED, LLC,  
9 ARTISTSHARE, INC.,

10 Markman Hearing

11 Defendants.

12 -----x  
13 New York, N.Y.  
14 December 17, 2012  
15 9:30 a.m.

16 Before:

17 HON. PAUL A. CROTTY

18 District Judge

19 APPEARANCES

20 STEPTOE & JOHNSON LLP  
21 Attorneys for Plaintiff  
22 BY: TIMOTHY BICKHAM  
23 MICHAEL J. ALLAN

24 LANDO & ANASTASI LLP  
25 Attorneys for Defendants  
26 BY: CRAIG R. SMITH  
27 WILLIAM J. SEYMOUR

1 (Case called)

2 THE COURT: Good morning. Who is going to be speaking  
3 for Kickstarter?

4 MR. BICKHAM: I'll be the principal speaker. Mr.  
5 Allan will say a few words, if that's all right with the Court.

6 THE COURT: How long do you want?

7 MR. BICKHAM: I believe your Honor set this hearing  
8 for about three hours.

9 THE COURT: Just because I did that, you don't have to  
10 take all the time. If you can do it in less time, that would  
11 be fine.

12 MR. BICKHAM: We'll try to get through it quickly. If  
13 we split the time evenly and say 90 minutes each side, we would  
14 like to go a little bit more than an hour and then save a few  
15 minutes for rebuttal.

16 THE COURT: Fine. Do you want to go ahead? How about  
17 you, Mr. Smith?

18 MR. SMITH: Your Honor, it is up to you in terms of  
19 how you handle it. In a claim construction here to instead of  
20 having one side go and present all of its evidence on all of  
21 the terms and then let the other side come up and give all of  
22 their evidence, I think it is sometimes helpful to have one  
23 side present on one term, have the other side present on the  
24 same term, so you hear the arguments right next to each other.

25 THE COURT: That makes sense. Do you want to do it?

1                   MR. BICKHAM: Your Honor, we will do it however you  
2 would like. In our experience flow is much smoother if we just  
3 give our presentation. Frankly, it is done most times,  
4 presentation-presentation.

5                   THE COURT: Go ahead, start your presentation.

6                   MR. BICKHAM: Your Honor, we have some copies of our  
7 slides. If I may approach?

8                   THE COURT: Sure. Go ahead.

9                   MR. BICKHAM: Good morning, your Honor.

10                  THE COURT: Good morning.

11                  MR. BICKHAM: What we would like to do is take a very  
12 brief couple of minutes to go through, set the context for  
13 today's hearing, to give a little bit of background, speak to  
14 the legal principles just briefly, and then get right into the  
15 claim terms.

16                  The patent that we are talking about is U.S. patent  
17 number 7,885,887. For abbreviation --

18                  THE COURT: '887?

19                  MR. BICKHAM: Yes, your Honor. We refer to it as the  
20 '887 patent. It is directed to a method and system for raising  
21 finance or revenue by an artist for a project. Essentially,  
22 this is crowd funding for artists.

23                  There are nine disputed claim terms. Logically they  
24 fall into two categories. Category one are claims that are not  
25 the software tools claims. There is fan and client, both of

1 which appear in the specification. The entitlement, including  
2 at least one of the products they service in a patronage, is  
3 actually a phrase that the parties are asking the Court to  
4 construe. "Patron" is a critical term in the patent, and  
5 "patron database."

6 The second group of terms is the software tool terms.  
7 These are software tools provided to the artist or account  
8 manager to do certain things in various claims, so software  
9 tools to manage at least one project, software tools to manage  
10 communications through the patron database, software tools to  
11 design an artist-specific web page, and software tools to  
12 present at least one project.

13 Crowd funding is an old concept. There is a great  
14 example of crowd funding not far from the courthouse. That is  
15 the Statue of Liberty. The French people gave the United  
16 States the statue, but the United States had to pay for the  
17 pedestal. To do that, the government didn't have money, so a  
18 crowd funding system was used to generate money for the  
19 pedestal.

20 This is Joseph Pulitzer. He ran these advertisements  
21 or notices in his newspapers. Basically, he said if you give a  
22 dollar, you will get a replica; if you give \$5, you get a  
23 bigger replica. Through this campaign they raised the \$300,000  
24 or so that was required to build the pedestal.

25 Legal principles. They are not really in dispute, but

1 the parties take a different view of them. The purpose of the  
2 claim construction hearing is for the Court to define the  
3 disputed claim terms and to give meaning to the claim language  
4 so that the jury will have something to work with, something  
5 that they understand. The construction is done as a matter of  
6 law. In the construction, the Court looks through the lens of  
7 the hypothetical person of ordinary skill in the art to  
8 interpret the claim.

9 THE COURT: You have a dispute about that, don't you?

10 MR. BICKHAM: Yes, your Honor, we do. We provided a  
11 definition of a person of ordinary skill in the art in our  
12 opening brief. Defendants did not; we are not sure why,  
13 because that is the framework that you need to look at the  
14 claims. Then, in the response brief they submit a definition  
15 of somebody skilled in the art as being self-taught computer  
16 programmer with some understanding of the music industry.

17 Frankly, your Honor, this definition of person of  
18 ordinary skill doesn't make much sense and, it's also so low  
19 that my third-grade is almost a person of ordinary skill in the  
20 art. Self-taught programming and some knowledge of the music  
21 industry.

22 THE COURT: Should we ask your son to construe the  
23 claims here?

24 MR. BICKHAM: I don't think so. Defendants do, but we  
25 don't think so.

1           Also, the Phillips case says that you can't construe  
2 the claim terms in a vacuum. You have to look at the context.  
3 Here the context is really important. The evidence that the  
4 Court looks to in this case is only the intrinsic evidence.  
5 Neither side is asking the Court to look to extrinsic evidence.  
6 The intrinsic evidence is the patent prosecution history and  
7 all the prior art that is included with the prosecution  
8 history.

9           In this case the prosecution history is big. It's  
10 about 470 pages, and there's a lot of information in there.  
11 It's important for the Court to consider that information when  
12 construing the claims.

13           The file history is so large in part because there was  
14 a lot of interaction back and forth between the inventor and  
15 the Patent Office. The patent was filed in March of 2003. It  
16 sat around for a while before the Patent Office made a  
17 response. Then there were six amendments, there were four  
18 interviews with the examiner. There's a lot of information in  
19 there.

20           Another significant thing about this time line is we  
21 see from the prosecution history the specification that was  
22 filed with the Patent Office is static. It doesn't change.  
23 The claims change. Over this time it's clear that the things  
24 that are claimed in the patent are the Artistshare system. It  
25 is the system that is being used and worked in the public that

1 is being claimed. There are repeated references to the special  
2 features of the Artistshare system overcoming the prior art.

3 An example of how the patent changed originally, there  
4 was claim 15 that was submitted with the specification. Claim  
5 1 of the patent as issued, the main claim, is quite a bit  
6 different. It has terms that are not defined in the patent.  
7 They don't appear in the specification other than the claims.  
8 For example, the software tools don't appear in the  
9 specification, your Honor, they just appear in the claims.

10 You're going to hear several themes from the parties  
11 today, including that the words in the claims are carefully  
12 worded and they were put there purposely and they need to be  
13 given their proper weight in view of the context of the claims,  
14 the specification, and the prosecution history. Some of the  
15 terms are ambiguous, and the Court needs to look at how a  
16 person reading the intrinsic evidence would interpret these  
17 claims.

18 We believe that the defendants have taken a selective  
19 construction to arrive at their proposed constructions. They  
20 look at the terms in isolation, not in the context claims.  
21 When the prosecution history and the statements that were made  
22 to the Patent Office are considered, it's only the Kickstarter  
23 proposed construction that gives any basis for the disputed  
24 claim terms or for many of the disputed claim terms.

25 With that, your Honor, we're going to start with the

1 nonsoftware tool claim terms. Mr. Allan will address the first  
2 three.

3 THE COURT: All right.

4 MR. ALLAN: Good morning, your Honor. We'll start  
5 with "fan." This is the first term we will construe today.  
6 This is a term that the defendants would like construed. Here  
7 is the basic construction. Our construction is "a consumer  
8 admirer, follower, mentor, or any other individual interested  
9 in the artist's work." That comes directly from the  
10 specification through the definition of this term in the  
11 patent. The defendants want to limit this to "any individual."

12 So, as a basic matter in tentative claim construction  
13 law, where the term is specifically and clear defined, that is  
14 the construction your Honor should use. Here it is in fact  
15 plainly defined in the specification. Moreover, our definition  
16 makes common sense, where the other side's doesn't. I'll get  
17 to that in a moment.

18 Here is the language from the specification. It's  
19 taken directly from there. "A fan may be, but is not limited  
20 to, a consumer, admirer or follower, mentor, and any other  
21 individuals interested in the artist's work."

22 What the defendants have a problem with is this "may  
23 be, but is not limited to" language. They argue essentially  
24 that that allows them to take everything out of the definition,  
25 including this critical piece, "interested in the artist's

1 work."

2           The fact that somebody is interested in the artist's  
3 work is the common denominator to the definition of "fan." The  
4 fact that a fan may be a consumer, admirer, or anybody else, a  
5 judge, a clerk, a lawyer, a garbage truck driver, clerk,  
6 whoever, those people all have to be interested in the artist's  
7 work. That is the common denominator. That is in our  
8 definition, it is not in theirs.

9           Although, they do admit in their brief, and this comes  
10 from their brief, that that is the definition, "any other  
11 individual interested in the artist's work." So the critical  
12 language from the term that they take out they admit in their  
13 brief should be there.

14           Why are they wrong? Their construction makes no  
15 sense. I'll give you an example. A fan, your Honor, is  
16 somebody that likes something. It's not just anybody.  
17 Opposing counsel is from Boston. We are going to have a lot of  
18 disagreements today. This is one thing I think we will  
19 possibly agree on.

20           People that like the Yankees don't like the Red Sox,  
21 people that like the Red Sox don't like the Yankees. Under  
22 their definition of "any individual," a Yankee fan is also a  
23 Red Sox fan. That just doesn't make any sense on a number of  
24 different levels. So from a common sense perspective, their  
25 construction doesn't make sense. It also completely ignores

1 the definition that is included in the patent.

2 By limiting "fan" to any individual as opposed to any  
3 individual who has shown an interest in an artist's work --

4 THE COURT: You say any individual limited.

5 MR. ALLAN: Let's go back to the term. It's any  
6 individual interest in the artist's work. If I said "limited,"  
7 I misspoke.

8 THE COURT: "Any individual" doesn't have any  
9 limitation. In the construction you're seeking, you do have a  
10 limitation. The limitation is "interested."

11 MR. ALLAN: Sure.

12 THE COURT: You say any individual, that's the  
13 limitation. But "any individual," the way I read it and common  
14 sense terminology, "any individual" is not limited, it's any  
15 individual. It's broad.

16 MR. ALLAN: Right. But we are not talking about any  
17 individual, we are talking about a fan. The individual has to  
18 have an interest in somebody to be a fan. If you're not a fan  
19 of the Jets, then you're still any individual but you're not  
20 interested in the Jets. That's the distinction.

21 THE COURT: For your definitional purposes, then, a  
22 fan is someone who is interested?

23 MR. ALLAN: Any individual interested in the artist's  
24 work.

25 THE COURT: The operative term, the critical term for

1 you is "interested"?

2 MR. ALLAN: The critical phrase are these words: "Any  
3 individual interested in the artist's work." These are  
4 examples that are provided directly out of spec, "the consumer,  
5 admirer, follower, mentor, and any other individual interest in  
6 the artist's work." But the interested in the artist's work  
7 has to apply to anybody, any individual; otherwise, they are  
8 not a fan, by their own definition and by common sense.

9 THE COURT: All right.

10 MR. ALLAN: One point I do want to make, your Honor,  
11 is that they make the point in the briefing that the patent  
12 examiner confirmed that "fan" is broadly encompassed by "any  
13 individual." The patent examiner did not make that  
14 confirmation.

15 The cite to the record is actually a citation to their  
16 own response to an office action where they state, "Applicant  
17 agrees that 'fan', as used and described in the spec, is a  
18 broad term, as it encompasses any individual." That is their  
19 own self-serving statement. That is not a reference to  
20 anything that the examiner cites, and there is indeed nothing  
21 in the record to suggest that the examiner veers from the  
22 definition that is contained in the patent.

23 In summation here on this term, Kickstarter's  
24 construction is based on the very clear definition contained in  
25 the specification, including the common denominator we

1 mentioned, it is also based on common sense, and we think it  
2 will help the jury.

3 Next term up is "client," your Honor. Kickstarter  
4 proposes to define "client" as "a computer terminal or device  
5 used by a fan that receives offer data from the server." The  
6 defendants propose to define it as "a device capable of  
7 communicating across a network."

8 One of the tenets of claim construction that Mr.  
9 Bickham mentioned and that I don't think there is any dispute  
10 on in terms of the law is you've got to read the claim term  
11 that is at issue in the context of the claim. "Client" as a  
12 term that we would like the Court to construe is only in claim  
13 1 of the patent. I have highlighted here the section that  
14 references "client" because the context of the term is really  
15 critical to the proper construction here.

16 With respect to "client" in claim 1, is it is very  
17 clear that the client that is referenced is the client of the  
18 fan, transmitting offer data from a server to a client via a  
19 network; receiving at the client, the fan's client, the fan's  
20 computer, the fan's device, such offer data and presenting the  
21 offer to the fan; transmitting the acceptance data back to the  
22 server from the client, from the fan's client; accepting the  
23 offer.

24 Artistshare's construction is based on the  
25 specification. They reference the overall system portion of

1 the specification, which speaks to a variety of different types  
2 of clients, not necessarily all within the embodiment that is  
3 covered by these claims.

4 THE COURT: I can't read this. That is in reference  
5 to what column?

6 MR. ALLAN: This is column 8, your Honor, lines 38 to  
7 45. And there are references to the client computer of an  
8 investor, client computer of a fan, client computer of a retail  
9 establishment, an industry professional, and a manufacturer.

10 The thing is, your Honor, that in the context of the  
11 claim -- again, we are only talking about claim 1 that this  
12 term is at issue -- the only client that is referenced in these  
13 examples that has any reference to that claim in context is  
14 that of the fan.

15 Here is an example of why that is. What we did here,  
16 your Honor, is we took the language from claim 1 and we plugged  
17 in one of the other claim examples that the defendant are  
18 relying on for their construction. It absolutely makes no  
19 sense in context. "Transmitting offer data from a server to a  
20 manufacturer client via network, the offer data comprising an  
21 offer to fans" -- right off the bat it is not making sense,  
22 because the manufacturer is not providing any offer to fans --  
23 "concerning at least one project wherein the offer is for a  
24 sales container at a predetermined level of patronage in  
25 exchange for funds."

1           Then "receiving at" -- in context it should be the  
2 client of the fan, but here we are plugging in the client of a  
3 computer manufacturer -- "such offer data and presenting the  
4 offer to the fan." Again, it makes no sense to have these  
5 examples in. Finally, "transmitting the acceptance data back  
6 to the server from the manufacturer" makes no sense. It's the  
7 fan. That's the way you need to look at this in context.

8           So, that is what we have done. We read the claim in  
9 context. The entity that receives the offer to the fan in  
10 claim 1 is the fan. We contend, your Honor, that defendants'  
11 construction ignores the context of the claim, which is not  
12 what you are to do under the well-settled and black letter  
13 claim construction law. By focusing the scope of this  
14 construction to the term in context, you will add some clarity  
15 for the jury.

16           THE COURT: Let me ask you a question. Is "client"  
17 defined anywhere in the lexicon of computers? Isn't there a  
18 standard definition for "client" independent of this patent,  
19 independent of the claims and specifications? Isn't there a  
20 standard definition for "client"?

21           MR. ALLAN: There may be, your Honor. We don't have  
22 that evidence in front of us today. We would be happy to  
23 submit something if you like. Do think, though, that  
24 "client" --

25           THE COURT: I have a reference here, what is a client,

1 a word definition from The Computer Dictionary. It says, "an  
2 application that runs on a personal computer or work station  
3 that relies on the server to perform some operations." That is  
4 what a client is.

5 MR. ALLAN: That's a program, your Honor. What we are  
6 talking about here is a device. The patent talks about a  
7 BlackBerry or an iPhone or some sort of a computer or device,  
8 not necessarily an application program. So there is a bit of a  
9 distinction based on how the inventor used the term "client"  
10 here.

11 THE COURT: You contend what? How did he use it here?

12 MR. ALLAN: Let's go back to the proposed definition.  
13 In the beginning it's sort of the same, "a computer terminal or  
14 a device." They say "a device"; it's not necessarily an  
15 application program. When I think of "client" in terms of  
16 general computer parlance, I think of Microsoft Outlook is a  
17 client that I use email on or Lotus Notes is a notes-based  
18 application program client. What the patent speaks to is the  
19 device.

20 If you look at the terms, it's the device that the fan  
21 is receiving the offer data on. It's not a program. It's a  
22 terminal, a computer or device of some sort, at least how it is  
23 used in this particular patent.

24 THE COURT: All right.

25 MR. ALLAN: Next up, your Honor, is "entitlement,

1 including at least one of a product, a service, and a  
2 patronage." Before I get into this much further, I think it is  
3 important for your Honor to note that we are not asking the  
4 Court to construe the term "entitlement." We are asking the  
5 Court to construe this particular phrase.

6 THE COURT: You say this is conjunctive?

7 MR. ALLAN: That's right. We think this is just plain  
8 meaning.

9 THE COURT: The defendants say it is disjunctive?

10 MR. BICKHAM: That's right.

11 MR. ALLAN: That's right. In our view, "and" means  
12 and. If they had meant to say "or," then they should have said  
13 "or" in the patent, in the prosecution history. But they did  
14 not do that, your Honor.

15 This is, in our view, a situation where it is simply  
16 plain English grammar. If you say something includes at least  
17 one of an A, a B, and a C, it has to have at least one of an A,  
18 a B, and a C. You can't then say or A or B or C. To do so  
19 would change the scope of what they claimed in terms of the  
20 patent.

21 They claim that it is internally inconsistent, your  
22 Honor. I would submit to you that it is not at all internally  
23 inconsistent. I can give another sort of example. If you  
24 think of Thanksgiving dinner including at least one of a  
25 turkey, a pumpkin pie, and mashed potatoes, the Thanksgiving

1 dinner has to include all three of those elements. If you have  
2 just a pumpkin pie, it is not a Thanksgiving dinner. It is  
3 exactly the same situation here.

4 You obviously picked up, your Honor, on the issue.  
5 There is nothing inconsistent here. They cite to some  
6 references in the prosecution history, your Honor, to try to  
7 argue that they meant "or" when they instead said "and," but  
8 there is absolutely nothing in the prosecution history that  
9 rebuts the presumption that the plain and unambiguous plain  
10 meaning of the term should apply.

11 they make references to the fact that "entitlement" is  
12 used singularly as opposed to plurally sometimes in the  
13 prosecution history and the specification. That does  
14 absolutely nothing to change the scope of the term we are  
15 talking about. "Entitlement," that word is in a number of  
16 spots throughout the patent. What we are asking is a  
17 construction on this particular claim.

18 There is also a reference in their papers, your Honor,  
19 that I think it is claim 32, which is a dependent claim,  
20 requires that the components of an entitlement be digitized.  
21 There is nothing to suggest that the components to an  
22 entitlement in this context can't be digitized, and they have  
23 submitted nothing to suggest that's the case.

24 I think importantly here, your Honor, we are heavily  
25 supported by Federal Circuit and Southern District of New York

1 case law. I've got copies of the Superguide case and the  
2 Touchtunes case if your Honor is interested in reviewing them.

3 I thought to give you some context, this is the claim  
4 term that the Federal Circuit construed in the Superguide case,  
5 and it is basically identical, the same component and set-up  
6 that we are asking you to do right now: At least one of  
7 program start time, program end time, program service, and  
8 program type.

9 The patentee in that case wanted "and" to be "or."  
10 The Federal Circuit disagreed. With basically pure grammar,  
11 you can read the phrasing right from the court's ruling. What  
12 the Court did was they broke out Strunk and White Elements of  
13 Style and they figured out if you have a series of categories,  
14 when you use "and," it's a conjunctive list.

15 (Continued on next page)

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1                   Touchtunes, Judge Sweet's case, dealt with the same  
2 issue, just a couple of years ago. And again, I've included  
3 the claim term that was at issue there and exactly what Judge  
4 Sweet stated: "At least one of" and "is conjunctive."  
5 Requires at least one of each category.

6                   Now, you may hear my opposing counsel mention a couple  
7 of cases to try to distinguish Superguide and Touchtunes.  
8 There is no case that we're aware of, your Honor, and I don't  
9 think there's a case that you will hear about today, that  
10 required a complete deviation from the plain language of the  
11 rules. Reading everything in the conjunctive literally made no  
12 sense.

13                  There's a case I'm aware of, I think it's an earlier  
14 Southern District case, the Joao case in which there were four  
15 or five elements related to a bank transaction. The claim  
16 clearly called for only one piece of the transaction. Yet, the  
17 conjunctive elements all required them to be there, and it  
18 literally made no sense, and the judge in that case said  
19 because of that, I can't construe it in the conjunctive. And I  
20 think there may be another case like that. But you won't find  
21 any case, your Honor, I don't think, at least that we're aware  
22 of, that deviates from the plain meaning unless there is some  
23 scenario in which it makes no sense at all.

24                  THE COURT: Is that the Sleepy Hollow Bank case you're  
25 talking about?

1 MR. ALLAN: Yes, your Honor, it is.

2 In that case also, the Sleepy Hollow case, there was  
3 also a figure in the patent that listed the elements of the  
4 proposed claim term in the disjunctive, so there were a number  
5 of factors in that case that led the judge in that case to  
6 deviate from the ordinary meaning. None of those factors is  
7 present here.

8 THE COURT: Very well.

9 MR. ALLAN: Thank you, your Honor.

10 THE COURT: Patron.

11 MR. BICKHAM: Yes, your Honor.

12 Patron is a key term in the patent, and it appears in  
13 actually most of the claims that are being asserted, and this  
14 is a claim where it's particularly important to look at the  
15 claim in its context. The proposed constructions are,  
16 Kickstarter says, "a fan who registers with an artist and who  
17 provides a contribution to a project of an artist in exchange  
18 for certain entitlements."

19 ArtistShare says patron is "one or more individuals  
20 who contribute to one or more projects" or "is registered to do  
21 so." So the question for the Court is really what definition  
22 of patron does the claim refer to. There are two types of  
23 patron in the patent that are described in the specification.  
24 There are patrons who register with the ArtistShare system;  
25 those are essentially members. And there are also patrons who

1 are patrons of a specific artist. And the language here comes  
2 from the specification, one for patron upon registration, one  
3 for patron of the artist.

4 In the context of the claims, it's Kickstarter's  
5 construction that makes sense. The claim language speaks about  
6 a patron in terms of interacting with an artist. And, your  
7 Honor, there's only one patron that the jury should be  
8 instructed about in connection with the claims, as opposed to  
9 the specification. The claims require Kickstarter's  
10 construction.

11 Now, this is a dense concept looking at the  
12 specification and the claims. So here is an illustration. How  
13 does Joe Public become Joe Patron? He starts becomes  
14 interested in the artist's work. That makes him a fan.

15 Step two, register with ArtistShare.com. That makes  
16 him a patron, patron member of the system, and that's where  
17 ArtistShare or defendants would have the Court stop. That's  
18 the threshold or baseline. But under our definition, and  
19 supported by the specification, there needs to be registration  
20 with an artist and a contribution made to a project. Then Joe  
21 Public is Joe Patron of an artist. So Kickstarter's  
22 construction comes directly out of the specification, and this  
23 language in the specification also supports the fact that there  
24 is a member type of patron, somebody who becomes a patron  
25 merely by registering with the system.

1                   THE COURT: Let me ask you a question with respect to  
2 fan. You define fan as set forth in the '887 patent at column  
3 six, line 61, correct? That's the definition. Why don't you  
4 accept the definition that's set forth in line 64 from patron?  
5 You skip forward, further into the patent specifications.

6                   MR. BICKHAM: Yes, sir.

7                   THE COURT: Why isn't this definition a good one? If  
8 fan is defined properly in the patent, why isn't patron defined  
9 properly?

10                  MR. BICKHAM: A couple of reasons.

11                  THE COURT: Yes.

12                  MR. BICKHAM: First of all, the key is not what is the  
13 proper definition in the patent; it's what the proper  
14 definition of patron in the claims is. And this is the wording  
15 in the patent, "the patron may be but is not limited to a fan,"  
16 and then in parentheses, "has a consumer, admirer, follower,"  
17 what Mr. Allan was just speaking to, "that registers with  
18 ArtistShare and/or," so that's the member patron, by  
19 registration. "And/or contributes to or purchases an artist's  
20 project, work, or the actual artist." So that's the patron of  
21 the artist. This is a two-part definition, and it actually  
22 doesn't make sense because you can't purchase an artist.

23                  Kickstarter's definition makes sense in view of the  
24 claims. So, for example, if your Honor looks at claim 36 in  
25 the patent.

1                   THE COURT: All right. 36, system for marketing, and  
2 so forth?

3                   MR. BICKHAM: Yes, sir, or even at the top of that  
4 page, 35, in claim 35.

5                   THE COURT: Okay.

6                   MR. BICKHAM: So these claims all require something  
7 beyond mere registration. They require an affirmative act of  
8 the fan to accept the offer from the artist and then they're a  
9 patron. These claims don't talk about just registration and  
10 stop. They talk about the patron who accepts the fan's or the  
11 artist's offer. In 35, at the bottom of 35, this is column 24,  
12 so the offer is transmitted to the fan or the patron, and then  
13 the claim continues at the top of column 25, receiving  
14 acceptance of patronage from the patron.

15                  So now, so there's a difference between fan or patron,  
16 that until they receive and accept that offer, they're not a  
17 patron.

18                  THE COURT: They're not patrons. Is that what your  
19 point is?

20                  MR. BICKHAM: Yes, sir.

21                  THE COURT: They're not patrons until they've --

22                  MR. BICKHAM: Yes, sir.

23                  That's also illustrated in column 36, at the top,  
24 registering the fan as a patron. This is once they accept the  
25 offer. Then there's registration of the fan as a patron in a

1 patron database. So here again, the fan becomes a patron after  
2 they accept an offer, and we could have done slides for each of  
3 the independent claims here, but the concept is the same. The  
4 claims talk about one of the types of patron, and they don't  
5 refer to both kinds of patron that are in the definition and  
6 specification. And it's how the claim terms are used in the  
7 claims that the Court needs to construe.

8 THE COURT: All right.

9 MR. BICKHAM: Another problem with ArtistShare's  
10 construction is this. It defies common sense, really. Members  
11 are also described in the patent and the specification as  
12 people who register with the system. So registrants of the  
13 system are patrons and members, and the term is used somewhat  
14 interchangeably, and it's confusing. But under ArtistShare's  
15 construction, a patron can either be a member or someone who  
16 actually contributes to the project. This runs counter to the  
17 common sense of patron.

18 For example, I can enroll with Amazon.com. I can  
19 register with them, but that doesn't make me a patron in the  
20 normal sense of a patron, not until I make a contribution. Or  
21 the Kennedy Center, I can enroll with them and become a member,  
22 but until I give them something, that's not the common  
23 definition of patron. And so we submit that ArtistShare's  
24 generic definition is divorced from the claim language, which  
25 is the focus.

1                   The next term follows on to patron database.  
2 Kickstarter proposes this to be an artist-specific database  
3 that contains certain information, contact, sales, and  
4 demographic information, of his or her patrons gathered from  
5 the artist's projects. So this is information gathered from  
6 the patron after the patron has accepted an offer. ArtistShare  
7 uses a very broad definition, "a database containing  
8 information relating to one or more patrons." Now, that uses  
9 the patron/member definition of patron.

10                  So Kickstarter's approach to interpreting this claim,  
11 we started with the claim. Which patron is being referred to?  
12 We went to the prosecution history. Patron database is not in  
13 the specification. Patron database is not in the  
14 specification. So we went to the prosecution history. There  
15 are a number of statements in the prosecution history, that the  
16 system, which is the invention, is artist specific. And this  
17 is an example of where patron database comes up in the claims.  
18 And so the patron database is the database of patrons that  
19 contains the sales and marketing information.

20                  I mentioned that the prosecution history is important,  
21 and so this is the prosecution history. September 2010, that's  
22 seven years after the specification was filed with the patent  
23 office, Mr. Camelio, the inventor, said that the patron  
24 database is specific to a particular artist. Those are the  
25 words in his response to the office action, and the page

1 number, 437, refers to the prosecution history that we  
2 submitted in my declaration.

3 THE COURT: That's Exhibit 2, Bates No. 437?

4 MR. BICKHAM: Yes. And he distinguishes the prior art  
5 based on this artist-specific system.

6 Then this is consistent with the specification that  
7 says that the artist may control her database. She may share,  
8 sell, license, her database to other artists or third parties.

9 If this were not a patron-specific database, the  
10 reference would be saying that one artist can sell, license, or  
11 share patron information of other artists. It only makes sense  
12 that an artist can share, sell, or license information from  
13 their own patrons, and that's where we come with the  
14 artist-specific part of the definition.

15 The patron database contains more than just  
16 demographic information or contact information. And the  
17 prosecution history talks about that. It's the functionalized  
18 database where the artist may access the precise data on the  
19 patron's demographics and sales patterns. Now, demographics  
20 and sales patterns do not come from a registration. That  
21 doesn't come from patron/member patron. That comes from  
22 patrons of an artist patron.

23 There's also another place in the prosecution history,  
24 we don't have a slide for it, but page 363 of the prosecution  
25 history talks about the system transforming routine data into

1 the valuable ports and functionalized database wherein the  
2 artist may access precise data on a patron's demographics. We  
3 didn't just come up with demographics out of the air. That's  
4 363 of the prosecution history, first full paragraph, lines  
5 three and four.

6 THE COURT: The system transforms routine data into  
7 the valuable ports, is that what you're referring to?

8 MR. BICKHAM: Yes, your Honor.

9 THE COURT: That's page 363; in other words, page  
10 seven of the reply to office action?

11 MR. BICKHAM: Yes, your Honor.

12 So this is more than just mere registration that we're  
13 talking about. That's it for the nonsoftware tools.

14 THE COURT: All right. Why don't we hear from  
15 Mr. Smith on the nonsoftware tools.

16 MR. SMITH: Thank you, your Honor.

17 THE COURT: That's fan, client, patron database, and  
18 the entitlement about that, piece one prong.

19 MR. SMITH: Let me make sure I've got this straight.  
20 Fan, patron, patron database.

21 THE COURT: He went into the order of fan, client,  
22 entitlement for at least one project, patron, and patron  
23 database.

24 MR. SMITH: Your Honor, if you would, I have some  
25 paper copies of ours, to make it easier.

1                   THE COURT: Thank you. Go ahead.

2                   MR. SMITH: Thank you, your Honor.

3                   For our presentation, we had some initial slides from  
4 the beginning that give sort of an overview of some of the  
5 issues that were in play relating to funding projects. I  
6 wasn't sure if you were interested in getting some of that  
7 background or if you want me to dive right into the claims.

8                   THE COURT: If you think it's helpful for me to have  
9 the background, go ahead.

10                  MR. SMITH: I'll do it quickly to sort of frame some  
11 of the arguments that are going to come up today.

12                  One of the things that artists could do prior to the  
13 inventions that are disclosed in the '887 patent, many artists,  
14 especially if you're in the music industry, you have a  
15 situation where the only way to really get yourself recognized  
16 and get funding for whatever you wanted to do is to have some  
17 sort of a contract with a recording company. And so there was  
18 this difficulty about how do you get money in order to be able  
19 to fund any of your projects. And sort of a little bit of an  
20 illustration that I'll show on slide three of our slide deck,  
21 where what it's really showing is the notion of an artist who  
22 has to give up a lot in order to get a little.

23                  The artist has to give up their rights to the work.  
24 They have to give their creative work to the production  
25 company. The production company then takes over and they do

1 the marketing. They do the sales of it. Then the artist is  
2 the one that gets a little bit of money back from the  
3 production company. This model has been in place for many  
4 years, and many artists felt like it just doesn't work for  
5 them. Unless you're a very well-known big artist, you never  
6 get recognized. You never get any money for any of the work  
7 that you want to do, even if you're fortunate enough to get a  
8 contract with one of these production companies. And the  
9 patent goes into some detail describing some of the problems  
10 that artists had when they were trying to get funding and how  
11 difficult it was.

12 So, there was a need for a better solution to this  
13 problem, and the patent, the '887 patent, describes solutions  
14 for this problem. So instead of having this model where you  
15 have to really sort of get a production company or some other  
16 company to fund you to get you moving, here is a model where  
17 you could get others to fund your projects, even before they  
18 were created, and allow you to then use those funds to put  
19 forward your project. Some of the benefits are it allowed the  
20 artists to be able to have the money ahead of time and be able  
21 to fund their projects and bring them to fruition, whereas in  
22 the past that might never have happened.

23 The concepts behind the inventions are disclosed here.  
24 It's sort of helpful to understand it from the concept of  
25 what's going on. These system claims in the patent are talking

1 about this notion of you have this system that is going to  
2 allow artists to come in and create a description of what their  
3 project is, be able to market it, and then allow that to go out  
4 to people so that other people could see it. Anybody could see  
5 it. It could be on the Internet, on any Web page, where you  
6 would be able to see what these artists are doing, what they're  
7 up to, and then be able to use that to create interest in what  
8 you're working on and get people to then fund you as a result  
9 of it.

10 There are several different aspects of the invention  
11 described in the specific figures of the patent. You heard a  
12 little bit of Kickstarter's suggesting that there is no  
13 disclosure of what kind of tools that the artist could use for  
14 purposes of managing their project or presenting their project,  
15 when, in fact, if you look through the patent, there are  
16 something like 60 figures which go into detail about what each  
17 of these aspects could look like in terms of what the artist  
18 could use in terms of managing a project, presenting a project.

19 Also, one of the lead aspects of the particular seven  
20 inventions that are disclosed in the patent is this idea that  
21 you give people something in return for committing to funding  
22 your project. It could be a product, it could be a service, it  
23 could be a patronage. The patent calls those entitlements.

24 Finally, the inventions also allow communications with  
25 the people who are either looking at different projects, they

1 might be interested in them, they might not be, and people who  
2 decide they want to fund the project and then go forward and  
3 actually commit to funding. It allows communications with all  
4 those people.

5 I think you have already heard a little bit about the  
6 claim construction law, so I'm not going to belabor the point.  
7 I do think there are a couple of key points worth emphasizing  
8 for purposes of our conversation.

9 The first is although there are claim terms that both  
10 sides say are in dispute, it's up to the Court to decide  
11 whether or not every term actually needs to be construed.  
12 There are times when claim terms on their face are easily  
13 understood, and I think we've got a number of them here where  
14 the Court can decide whether or not it actually has to be  
15 construed after other terms are already construed.

16 THE COURT: You say there are only two terms that have  
17 to be construed?

18 MR. SMITH: That's correct, your Honor.

19 THE COURT: And those two terms are?

20 MR. SMITH: Fans and patrons.

21 I think the most critical aspect of the claim  
22 construction law comes out of the Federal Circuit's Phillips  
23 case, the en banc decision in Phillips. It goes through in a  
24 lot of detail how the Court should proceed and look at claim  
25 construction. The most important element that comes out of

1 that case is the notion that the claims are going to be given  
2 their ordinary and customary meaning. That's the meaning that  
3 should control the claims, and although there are some limited  
4 exceptions to it, that's what the Court should be focusing on,  
5 what is the plain and ordinary meaning.

6                 The two exceptions that the courts have been willing  
7 to say we're going to deviate from the plain and ordinary  
8 meaning --

9                 THE COURT: Where the patent actually discloses, this  
10 is the normal meaning, here's the meaning for this one, and he  
11 defines it.

12                 The second one is, what, estoppel?

13                 MR. SMITH: That's where if you disavow the full claim  
14 scope by something you say in your specification or prosecution  
15 history, and there it has to be clear and unmistakable, and  
16 ambiguities as to whether or not there was any disavowal don't  
17 count.

18                 THE COURT: The way I read the papers, both sides  
19 agree on what the legal definitions are.

20                 MR. SMITH: I think that's right, your Honor. I think  
21 there is an emphasis that changes if you read through their  
22 briefing. A lot of what they say is you should read these  
23 limitations into the claims, but that's all the exception to  
24 the rule, and I think framing it to make sure it's clear, the  
25 rule is you should be entitled to the full scope of your

1 claims.

2           The exception is what they're arguing for their claim  
3 construction. They're saying it's the exception to the rule  
4 that always applies, that in every one of their instances, you  
5 should take something from either the specification or the  
6 prosecution history and incorporate it into the claim language,  
7 even though that claim language doesn't have that limitation  
8 there.

9           Courts have also emphasized the notion that you  
10 shouldn't read limitations into the claims. That's not the  
11 purpose of the specification, to be taking things and  
12 incorporating them into the claims. It's the claims that  
13 define the invention, not the specification. Again,  
14 prosecution disclaimer has to be clear. It can't be ambiguous.

15           I was going to jump right into starting with fans.

16           THE COURT: Why don't you. I'm ready to hear what you  
17 have to say.

18           MR. SMITH: Right.

19           As you've heard, there's a dispute as to what fans  
20 means. Our definition of fans means it's any individual.  
21 Kickstarter's definition is much narrower than our definition.  
22 Their definition requires that it can be several different  
23 types of people, but as you clued into in your questioning of  
24 Kickstarter's counsel, their key limitation is the notion that  
25 every one of those individuals has to be interested in the

1 artist's work. That, they say, comes from the specification,  
2 meaning they say they're just taking the definition from the  
3 specification, but they're not really because the definition in  
4 the specification, as we put up on this slide, specifically  
5 says "a fan may be but is not limited to a consumer, admirer,  
6 or follower, mentor, and any other individuals interested in  
7 the artist's work."

8 THE COURT: Let me ask you a question. I know nothing  
9 about this. I'm a complete innocent when we're dealing with  
10 project funding. Am I a fan?

11 MR. SMITH: I think you could be. Sure.

12 THE COURT: No. Am I?

13 MR. SMITH: Yes.

14 THE COURT: Even though I know nothing about this? I  
15 have no interest in music. I have no interest in supporting an  
16 author or creative artist. I'm a fan under your definition?

17 MR. SMITH: Correct, your Honor.

18 The way they're describing fan is anyone who can come  
19 in, take a look at what's going on and say am I interested or  
20 not. It doesn't have to be someone who has some preconceived  
21 notion of, Oh, I'm already interested in this particular artist  
22 and therefore I'm a fan of it.

23 THE COURT: I'm a cheapskate. I'm not interested in  
24 giving anybody anything for any kind of entitlement. There is  
25 no inducement you can offer me. Am I still a fan?

1                   MR. SMITH:    sure. You could still go on and look.

2                   THE COURT: I have no interest in doing that. I'm a  
3 Luddite.

4                   MR. SMITH: Under our definition, you could still be a  
5 fan.

6                   THE COURT: How about somebody that doesn't have a  
7 computer?

8                   MR. SMITH: They could be a fan, too. Would they fall  
9 within everyone, would someone who doesn't do anything,  
10 actually be involved?

11                  THE COURT: I know there are further steps. I'm  
12 talking about the first step, the definitional step.

13                  MR. SMITH: Sure.

14                  THE COURT: You mean any individually, using that  
15 quite literally?

16                  MR. SMITH: Quite literally. Any individual.

17                  The patent is written to be clear that a fan can be  
18 anyone. They had to pick a term that could be used to describe  
19 what it is that is going to be involved in people going and  
20 looking at a Web site, seeing if they're interested.

21                  THE COURT: How is it Kickstarter's definition excess?  
22 I know you caution against taking excess verbiage, but what  
23 they want to do is use your own verbiage. How is that excess?  
24 You define fan in column six, I think. That's your language.

25                  MR. SMITH: That's correct. That's the language from

1 the specification.

2           What they're trying to do is to say you've defined it  
3 like this, making it clear that it's broader than just what you  
4 said in the spec, but not limited to, it can be other people,  
5 and saying we're going to cut out but it's not limited to and  
6 say it's only these people. And so our argument is you can't  
7 just take words from the spec and say, Okay, now we're going to  
8 say that this is the only thing a fan can be; it can only be  
9 these limited people because that's what you said. In fact,  
10 what we said is it's not limited to those people, but those are  
11 examples of people who could be fans.

12           THE COURT: It says "consumer, admirer, follower, or  
13 mentor." Those are people who are, by definition, interested.

14           MR. SMITH: Yes.

15           THE COURT: Any other individual interested, so you  
16 define classes of fans who have an interest. If you're a  
17 consumer, you're a fan, right?

18           MR. SMITH: You could be. You don't have to. I could  
19 think of consumers going to the site and seeing a whole list of  
20 potential artists. Do you have to be interested in that  
21 specific artist?

22           THE COURT: In the common sense, doesn't consumer  
23 indicate you've actually bought something, you've consumed  
24 something? It doesn't deal with potential. It deals with  
25 someone who has actually done something.

1                   MR. SMITH: I don't think that consumer connotes in  
2 this interpretation that the consumer has to have already  
3 purchased something from a particular artist.

4                   THE COURT: How about admirer or follower? That  
5 indicates an affirmative act, you know something about the  
6 object. You admire it, through some kind of active conscience  
7 or mind act that's going on.

8                   MR. SMITH: I agree with you, your Honor. I think the  
9 admirer or follower is more specific than just consumer.

10                  THE COURT: Mentor suggests there is some type of  
11 relationship between the fan and the artist.

12                  MR. SMITH: Correct. I don't think it necessarily  
13 goes as far as to say a mentor has to be interested in the  
14 person's work. A mentor could be just interested in helping  
15 someone, but I don't think you have to be interested in the  
16 artist's work in order to be a member.

17                  THE COURT: They would have to be interested in  
18 something.

19                  MR. SMITH: Interested in helping. I like to do pro  
20 bono work. I'm interested in helping, but I don't have to  
21 necessarily be interested in whatever the people are doing.

22                  THE COURT: Go ahead.

23                  MR. SMITH: Again, we base our definition of any  
24 individual based on how broadly the patentee described it. We  
25 also look at specifically if you go to the specification, it

1 talks about fan very broadly as well. It talks about a fan can  
2 access the ArtistShare home page and view public Web pages of  
3 the artist. That sounds like any individual. You don't have  
4 to be any specific type of fan to just go and look at a  
5 specific Web page on a specific site. You could just be  
6 someone who is just interested in music and you can go and look  
7 and see, Oh, I notice that there are a number of bands who are  
8 looking for funding for this particular project.

9           We also looked at the prosecution history to see how  
10 does that support our particular definition of what a fan  
11 should be. During the prosecution history, the patentee was  
12 questioned during the examiner interview, where you're allowed  
13 to go talk to the examiner about what are the examiner's  
14 concerns, what are things going on that the examiner wants to  
15 talk about. And one of the issues was the examiner noting that  
16 the term "fan" seemed very broad. And here, the applicant is  
17 specifically saying to the examiner, so that there is a clear  
18 understanding during the prosecution of this patent, "the  
19 applicant agrees that fan as used and described in the  
20 specification is a broad term, as it encompasses any  
21 individual."

22           So there was no ambiguity with respect to the examiner  
23 as where the examiner understood what ArtistShare was saying a  
24 fan is. It was clear they were saying a fan is any individual.

25           THE COURT: Where is that from? Can you go back one

1 slide? What page is that?

2 MR. SMITH: We just attached portions that we think  
3 are relevant. This is actually Exhibit B to William Seymour's  
4 declaration. It's at page eight.

5 THE COURT: Thank you.

6 MR. SMITH: You've pointed this out during some of the  
7 questioning, what is it that's potentially a problem with  
8 Kickstarter's definition of fans. And I think the issue is  
9 like many of their interpretations, they're trying to cram  
10 additional limitations into terms that don't belong there.  
11 Patentees should be entitled to the full scope of what their  
12 invention covers. It was clear that fan could be a much  
13 broader term than the one that Kickstarter wants us to  
14 interpret it to mean, and that's the reason why we believe  
15 Kickstarter's construction is improper. It's just unduly  
16 limiting.

17 THE COURT: You're on to patron now.

18 MR. SMITH: That's right, unless you have anything  
19 further.

20 THE COURT: No, I don't.

21 MR. SMITH: Thank you.

22 Patrons we define as one or more individuals who  
23 contribute to one or more projects or is registered to do so.  
24 Although Kickstarter says it takes this definition from the  
25 specification, it seems to take part of the definition from the

1 specification and limit other parts of what it doesn't like  
2 from the specification.

3 For example, if you look at the specification, the  
4 specification actually says "a patron may be, but is not  
5 limited to, a fan who can be a consumer, admirer, or follower,  
6 mentor," and the like, "that registers with the ArtistShare  
7 and/or contributes to or purchases an artist's project, work,  
8 or the actual artist."

9 THE COURT: What does "or the actual artist" mean,  
10 that hanging, dangling participle?

11 MR. SMITH: I think it means that you can contribute  
12 to the artist directly. You don't have to contribute to just a  
13 project. A patron can be someone who contributes to the  
14 artist, actual artist. It doesn't mean, as Kickstarter has  
15 implied, that you're purchasing the artist. The clause is  
16 "contributes to or purchases an artist's project, work, or the  
17 actual artist," so the contribution may be a contribution to  
18 the artist, him or herself.

19 THE COURT: Without going through your patent? Does  
20 the contribution have to be through the system that's covered  
21 by the patent, or could it be just outside the patent?

22 MR. SMITH: In the context of the claim, I think it's  
23 clear that what we're talking about is someone who is  
24 ultimately going to contribute to a particular project, but  
25 that isn't a limitation meaning patrons don't have to

1 contribute in order to be patrons. And we're going to see why  
2 that's just abundantly clear when we walk through the claims  
3 and the specification.

4 THE COURT: Go ahead.

5 MR. SMITH: One of the first examples to show you why  
6 a patron is much more than just someone who has to contribute  
7 to a project, as Kickstarter suggests, again we're at slide 30  
8 on our slide deck, here it's showing a schematic of someone who  
9 can have a patron account or patron information in it. But  
10 there's no requirement that there's any sort of contribution  
11 that has to take place in order to have a patron account. And  
12 so a patron can certainly be somebody who hasn't done any  
13 contributing but is just simply registered with the fan-funding  
14 site. And that's clarified even in the specification where we  
15 cite to the specific language on column 17, lines 45 through  
16 47, which say, "upon registration with ArtistShare, the fan  
17 (now a patron) may then access a member area," which just  
18 generally includes more features and content.

19 So the clear implication is that registration alone is  
20 enough to become a patron. There's no requirement, as  
21 Kickstarter suggests, that you have to both register and  
22 contribute in order to be a patron.

23 THE COURT: What's the difference? If you're a fan  
24 and you register, you're still a fan, right? Upon  
25 registration, you become a patron.

1                   MR. SMITH: That's exactly right, your Honor. Once  
2 you register, you become a patron.

3                   THE COURT: How does the system recognize that you're  
4 a fan?

5                   MR. SMITH: Any individual who is looking at the site  
6 is considered a fan.

7                   THE COURT: What does the fan have to do to move from  
8 her status or his status as a fan?

9                   MR. SMITH: You have to either register with the  
10 system or you have to contribute to a particular project.

11                  THE COURT: How do you contribute without registering?

12                  MR. SMITH: Most likely, you have to register to  
13 contribute, but there could be a situation where you could just  
14 contribute. There may not have to be a registration in order  
15 to contribute.

16                  THE COURT: All right. Go ahead.

17                  MR. SMITH: But, clearly, specification claims do not  
18 require that those two steps have to occur in order for it to  
19 go forward. It could be anonymous contributions, as one  
20 example.

21                  During prosecution, we're looking for how do the  
22 claims specification and the prosecution history line up; do  
23 they make sense together as a whole. And here again, during  
24 prosecution, it's clear that patron is broader than having to  
25 just contribute. Specifically, in Exhibit B, which is part of

1 the prosecution history to the '887 patent, the May 5, 2010,  
2 portion of the prosecution history talks about, for instance, a  
3 patron is defined, for example, in paragraph 168 as a fan who  
4 has registered with ArtistShare. Again, registration is enough  
5 to become a patron. There's not a next step that you have to  
6 contribute, although a patron could certainly contribute.

7 During Kickstarter's argument, they pointed to a  
8 couple of things that they say support their position, but I'll  
9 argue, your Honor, that actually they don't; they support our  
10 position. Counsel for Kickstarter pointed you to claims 35 and  
11 36 of the patent. I'd like to see if we can just pull that up  
12 for you.

13 So here we are. I'm showing 35 on the screen. And  
14 what they pointed to and suggested that, Well, a patron has to  
15 be someone who's contributed because they look down on -- this  
16 is now claim 35, which starts on column 24, at about line 53,  
17 and then continues on to column 25, ending about line four.

18 THE COURT: Right.

19 MR. SMITH: And they indicated that because, if you  
20 look at the end of the claim, where it says that "receiving  
21 acceptance data for an entitlement at a predetermined level of  
22 patronage from the patron," they're suggesting that that's the  
23 point at which you become a patron, but that wouldn't make any  
24 sense in light of the language which precedes it, which says,  
25 "transmitting offer data to said fans and/or patrons." The

1 patron here could clearly be someone who hasn't yet contributed  
2 to this particular artist. So the preceding step, I would say,  
3 argues against Kickstarter's construction which clearly shows  
4 that you're transmitting offer data to fans or patrons, and  
5 it's not indicated that that person has done anything to  
6 actually contribute to a project.

7 THE COURT: Which person do you make reference to, the  
8 fan or the patron?

9 MR. SMITH: It says, "transmitting offer data to said  
10 fans and/or patrons." So I'm looking at column 24, line 65.  
11 This is the claim element that just precedes the portion that  
12 Kickstarter's counsel was referring to.

13 THE COURT: Okay.

14 MR. SMITH: So looking at Kickstarter's construction,  
15 the problem we have with it is they're trying to take a term  
16 that we think is pretty easy to construe and add limitations  
17 into it to make it narrower than either the specification or  
18 the prosecution history ever intended and, I submit, even the  
19 claims as they're written and Kickstarter pointed to would ever  
20 be because now they're saying that patron has to have two  
21 elements, these two specific elements. They have to both  
22 register and contribute, and then they add an additional  
23 element in exchange for certain entitlement, again, additional  
24 verbiage which we don't think is supported by just the term  
25 "patron."

1                   THE COURT: And in your definition, you become a  
2 patron by registering or contributing, either one?

3                   MR. SMITH: Correct, your Honor. It could be both,  
4 but you just need one to become a patron. You don't need both  
5 of them.

6                   THE COURT: If you don't have to do both, you could do  
7 one or the other, what distinguishes the patron from the fan  
8 with regard to registration?

9                   MR. SMITH: Registering means that you're actually  
10 telling the system that you want to be part of the system. So  
11 you want to be able to --

12                  THE COURT: But you're a fan before that, aren't you?

13                  MR. SMITH: Correct. Before you become a patron.

14                  THE COURT: And on registration, are you always a  
15 patron then? You've lost your status, your status is no longer  
16 that of fan; you're a patron?

17                  MR. SMITH: After you've register, yes. I'd submit  
18 that you have now moved from a fan to a patron because once  
19 you've registered with the system, the patron gets entered into  
20 a database, and that would be a point where I've narrowed it,  
21 where now a fan is no longer just any individual, now you've  
22 registered with the system, now you are actually a patron.

23                  THE COURT: All right. Do you want to say a few words  
24 about the remaining three nonsoftware tools?

25                  MR. SMITH: Yes, your Honor. Do you want to talk

1 about patron database?

2 THE COURT: Yes.

3 MR. SMITH: Patron database I don't think actually  
4 needs to be construed simply because we've already described  
5 what a patron is. I think the Court will define for us what it  
6 believes a patron is, and patron database doesn't need to be  
7 independently construed because neither party is asking the  
8 Court to construe what the term "database" means. So we submit  
9 that once you've construed patron, patron database will  
10 actually be already construed. But if the Court sort of  
11 decides that it wants to construe patron database, then we  
12 submit patron database is a database containing information  
13 relating to one or more patrons.

14 Kickstarter takes a different approach and wants to  
15 incorporate a large number of additional limitations into the  
16 term "patron database." They want it to be artist specific.  
17 They want it to include certain specific information. And they  
18 want to define how that information is gathered. So they want  
19 three new limitations added into the claim for patron database.  
20 None of those, in my estimation, should be added to them.

21 First off, Kickstarter wants to add a bunch of  
22 information that has to be in the database. They list out  
23 three different categories of information that have to be in  
24 the database. That's on slide 33 where they have that. We  
25 submit that the claims already talk about what has to be in the

1 database, meaning the claims themselves specifically talk about  
2 registering contact and marketing information for purposes of  
3 claim one. Claim 17 talks about registering contact  
4 information. Claim 36 talks about registering the fan as a  
5 patron in a patron database.

6 All of those claims already talk about what it is that  
7 is getting put into the database. And the notion that now  
8 we're going to take the term "patron database" and add  
9 additional limitations that are not found anywhere in the  
10 claims themselves, in my view, violates the whole view of claim  
11 construction where you're not supposed to be reading  
12 limitations into the claims. We're supposed to be interpreting  
13 the claims, and what Kickstarter is doing is adding limitations  
14 that don't exist in the claims and are actually much narrower  
15 than the claims themselves actually say is what goes into the  
16 database.

17 One issue that I think needs vetting, too, is we refer  
18 a lot to patron database, but I think it's important, if you  
19 look at claim 17 of the patent, to see specifically how this  
20 database gets used in the claims. Claim 17, which is at  
21 approximately column 23, I'm going to be starting at around  
22 line 23, says, "allowing patrons to demonstrate interest in one  
23 or more projects, prior to, during, and after the creation,"  
24 and then it says, "registering contact information regarding  
25 interested patrons in a searchable database."

1           So here it's talking about taking the information  
2 about the particular patron and putting it in a searchable  
3 database. That's all it says about how this database is  
4 initially put together. It doesn't require any specific  
5 limitations as to whether it's artist specific or anything  
6 else. And then later in the claim term, when we get down where  
7 it says "managing communication," which is about line 34, it  
8 says, "managing communications through said patron database."

9           So there it's referring to the database that was  
10 referenced above where you're registering contact information.  
11 Here again, talking about a generic database. The patent talks  
12 about databases in terms of centralized database, database for  
13 the system. There is nothing in the claim that would require  
14 this to be some form of specific database that only applies to  
15 a specific artist. It's just a general database where patron  
16 information is put into.

17           Also, this language here further confirms what we were  
18 talking about earlier about patrons, where it talks about  
19 allowing patrons to demonstrate interest in one or more  
20 projects. Here is a patron who hasn't done anything yet; now  
21 it's interested in someone's project and now it does something  
22 with it.

23           THE COURT: Doesn't the patron have to indicate his  
24 interest in some specific artist project though?

25           MR. SMITH: No.

1                   THE COURT: No? It could just be any project, music,  
2 or a book?

3                   MR. SMITH: Could be any project that is available.

4                   THE COURT: Piece of art?

5                   MR. SMITH: Sure. There's no specific project that it  
6 has to be related to.

7                   The three limitations they try to add in are artist  
8 specific, specific data that goes into it, and where the  
9 information is gathered from. We already talked about how the  
10 claims already talk about what is in the database; you  
11 shouldn't be adding more information in there than what the  
12 claims specifically tell us. It talks about where it believes  
13 the information is gathered from. Again, the claims I just  
14 read to you from one of the claims talks about simply upon the  
15 interest of the patron, all of a sudden, information goes into  
16 this searchable database. It doesn't say that it's gathered  
17 from an artist's project. And again, the notion that they're  
18 trying to limit it to an artist-specific database, in our view,  
19 doesn't make sense because there's nothing about the databases  
20 that are described in the claims that have to be artist  
21 specific. And I'd submit that it also ignores the fact that  
22 the specification specifically talks about centralized  
23 databases and not just databases that are limited to a specific  
24 artist.

25                   During Kickstarter's discussion, they focused you on a

portion of the prosecution history where they were saying, Oh, here's where the patentee said that it has to be specific to a particular artist. What they didn't explain is the context of when that statement is made. They already distinguish all the prior art that the examiner had said that the examiner thought was relevant to discussing their invention and thrown in another reference that they said was analogous art, meaning that it might be related to some fan-funding concept. And the patentee said, No, this isn't really related to the systems that we're talking about, and went on to explain a bunch of reasons why it's not related to it. And so this isn't a situation where the patentee was trying to distinguish a piece of prior art based on a specific limitation, the type of disclaimer that would be necessary for a court to say, Oh, yes, you gave up some scope of your claim language.

Here, it was just the examiner had thrown a piece of prior art at them and said, Oh, we think this might be relevant, and the patentee is saying no, it's not even close, it's not even relevant to what we're talking about, here is why it's not relevant.

THE COURT: Do you want to say a few words about clients and entitlement?

MR. SMITH: The client appears on slide 41. I think you picked up on this during your questioning of Kickstarter. A client does have definitions that refer to sort of computer

1 and applications. I think there are some standard definitions  
2 of client.

3 In the patent, they use client very broadly just to  
4 refer to the large number of things that you can use to  
5 communicate across a network. We try to capture that  
6 definition in our proposed construction where the client is  
7 going to be a device capable of communicating across a network.  
8 We think that's a pretty honest assessment of the specification  
9 of what the patent claims describe.

10 Kickstarter again wants to add some limitations into  
11 that. They want it to be something that has to be used by a  
12 fan that receives offer data from the server. They want to  
13 craft in a couple of extra limitations that the term "client"  
14 doesn't ordinarily get and shouldn't get in these particular  
15 claims.

16 THE COURT: Do you draw a distinction between computer  
17 terminal and a device?

18 MR. SMITH: I think, yes, they can be different  
19 things. Computer terminal could be similar to the terminal  
20 that is sitting on your desk whereas a device could be a much  
21 different unit. It could be anything from a mobile device --

22 THE COURT: Under your definition, as distinct from  
23 Kickstarter's. They talk about a computer terminal. You only  
24 talk about a device.

25 MR. SMITH: Right, because I think a device could be a

1 computer terminal.

2 THE COURT: Device is a broader term in your  
3 terminology.

4 MR. SMITH: Correct, your Honor. I think our  
5 definition would encompass a computer terminal.

6 THE COURT: Right.

7 MR. SMITH: So a couple of limitations that  
8 Kickstarter adds in. There's nothing in there that requires  
9 that it be used by a fan. We don't have to incorporate client  
10 that is being used by fan. In fact, if you read the claims,  
11 the claims are all system claims. It's talking about what the  
12 system is providing to people who want to access the system.  
13 It's not talking about what the client is actually doing.

14 THE COURT: All right.

15 MR. SMITH: The specification clearly describes the  
16 client. It says, "each of the clients may communicate with the  
17 host via a computer network which may comprise the Internet;  
18 clients may be any wired or wireless device,"" and it's a very  
19 broad definition because client is something that could be  
20 many, many things as long as you're able to communicate with  
21 it.

22 THE COURT: All right.

23 MR. SMITH: I was going to move on.

24 THE COURT: To entitlement including at least one of a  
25 product or service or patronage?

1                   MR. SMITH: Correct, your Honor.

2                   That's on slide 53 of our slide deck. Here, the big  
3 dispute is how do you interpret "including at least one of."  
4 And the language of the claim is "an entitlement, including at  
5 least one of a product, a service, and a patronage."

6                   Kickstarter's definition reads the entire language "at  
7 least one of" out of the claim. They just say an entitlement  
8 is a product, a service, and a patronage. That can't be the  
9 right construction because you're totally eliminating the exact  
10 language that was used by the patentee to say an entitlement  
11 includes --

12                  THE COURT: Wait a minute. The language of the  
13 patentee is the word "and." Correct?

14                  MR. SMITH: Correct.

15                  THE COURT: But the way you define the term, it says  
16 "and." It becomes "or."

17                  MR. SMITH: I think it's proper to construe, I agree  
18 with you, yes, that "or" is, you can construe it to mean a  
19 product or a service or a patronage. And I think the way the  
20 patentee did that is just saying "at least one of," so one of  
21 the A, B, or C, not all three together, because that wouldn't  
22 be consistent with the way the claims are written and how the  
23 specification is written.

24                  THE COURT: The language of the Federal Circuit though  
25 seems to be against you in that.

1                   MR. SMITH: I don't agree, your Honor. They cited to  
2 a couple of cases that talk about using the "at least one of"  
3 language. But if you look, it's a little different because the  
4 language here says "at least one entitlement," and then it says  
5 including these other things. So an entitlement, including at  
6 least one of. So the entitlement is singular, and it's  
7 describing different types of entitlements. It's not saying  
8 the entitlement has to be these three things, and I think what  
9 the Federal Circuit has said is where you have a situation like  
10 this where Kickstarter is suggesting there's some ambiguity  
11 here, that it doesn't mean "and" and it doesn't mean "or," you  
12 look to the specification, and cases cited by Kickstarter fully  
13 support this, you look to the specification and say does the  
14 specification support that kind of construction, and it  
15 doesn't. And nor do the claims.

16                  THE COURT: Why do you use the word "and" then? This  
17 is your language.

18                  MR. SMITH: Right, your Honor. I didn't prosecute  
19 this.

20                  THE COURT: I know it's not your language, but on  
21 behalf of the patentee, you're stuck with the language that the  
22 patentee uses in the patent. Right?

23                  MR. SMITH: Right.

24                  THE COURT: Why do they use the word "and" if it  
25 really means, as you say now, "or"?

1                   MR. SMITH: Because I think they've used that same  
2 language in multiple claims, always meaning one, not meaning  
3 all. And I can point you to a couple of examples where they  
4 use the exact same language in the other claims. Here is claim  
5 eight, "a system according to claim one wherein the offer is  
6 presented in at least one of the following manners, an auction,  
7 a point of sale, a subscription, a license, and a sponsorship."

8                   There's nothing in here that suggests that "at least  
9 one" means all of those things have to happen. You have to do  
10 it in an auction, a point of sale. It wouldn't make sense that  
11 you're now doing it in every way.

12                  In claim 24, the patentee also uses that same language  
13 where it says "an offer is presented in at least one of the  
14 following manners" and gives the list of the specific manners.  
15 So I think the patentee reasonably used that language, "at  
16 least one," to make clear that it's talking about one of a list  
17 of things, and although it used the word "and," I don't think  
18 "and" is interpreted to mean all of the above because in the  
19 context, "at least one of" has to modify that. Otherwise, why  
20 would you use it?

21                  THE COURT: You don't want construction of the word  
22 "and," you want a construction of the words "at least one."

23                  MR. SMITH: That's right, your Honor.

24                  Our view is it's clear from the patent claims, it's  
25 clear from the specification that the "at least one" language

1 never meant to encompass every one of those, because then you'd  
2 look at these other claims, and it would make no sense if you  
3 used that interpretation.

4 THE COURT: All right.

5 MR. SMITH: Your Honor, dependent claims also support  
6 that view as well because if you go to page 32 of the patent,  
7 it talks about an entitlement and it says, "converting the  
8 received entitlement into a digital format." Claim 32 of the  
9 patent. This is a dependent claim that's referring back to the  
10 single entitlement and referring to saying you're going to  
11 convert the single entitlement into a digital format. That  
12 dependent claim would make no sense if the entitlement had to  
13 be a service, a patronage, and a product. How are you  
14 converting a service into a digital format? Or how are you  
15 converting a patronage into a digital format? It doesn't make  
16 any sense. That dependent claim would be meaningless because  
17 it would be suggesting that you're doing something that you  
18 can't do.

19 THE COURT: Thank you, Mr. Smith.

20 Mr. Bickham, do you want to talk about the  
21 software-related terms?

22 MR. BICKHAM: Your Honor, would it be okay if we  
23 addressed some of the comments and just wrap up the nonsoftware  
24 tools?

25 THE COURT: Two or three minutes.

1                   MR. ALLAN: Your Honor, I'll address very quickly the  
2 fans, the clients, and the software tool limitations.

3                   In terms of fans, I think this is very  
4 straightforward. It's defined. The common denominator is  
5 there. The fact that the "including, but not limited to"  
6 language may allow for others, other individuals, does not  
7 change the fact that the definition, according to the patent,  
8 the individual, whoever it is, a mentor, a follower, a taxicab  
9 driver, a boat captain, whoever it is has got to be interested  
10 in the artist's work. We've belabored this a bit, so I won't  
11 continue. I don't think there is any inconsistency. We're not  
12 trying to limit this at all beyond what they've spoken about.

13                  THE COURT: All right. Go ahead.

14                  MR. ALLAN: In terms of clients, again, there are a  
15 number of different clients that are referenced in the patent,  
16 in the specification, but claim one speaks to one specific type  
17 of client. You heard nothing different from opposing counsel.  
18 We're not trying to limit this in any way. We're trying to  
19 provide the correct context to the term that's at issue in the  
20 one claim that is at issue. That's claim one.

21                  Finally, with respect to the --

22                  THE COURT: Patron?

23                  MR. ALLAN: No. Mr. Bickham will handle that in just  
24 a minute.

25                  "Entitlement including at least one of," when I think

1 of this, I think of what is the definition of "is."

2 THE COURT: President Clinton told us that.

3 MR. ALLAN: President Clinton. Exactly.

4 They said "and," your Honor. They didn't say "or."

5 And the Federal Circuit and the Touchtunes case by Judge Sweet  
6 make abundantly clear that Mr. Smith's argument that we're  
7 reading "at least one of" out of the claim is absolutely wrong.  
8 Those cases a hundred percent found that this definition, the  
9 phrase we're asking your Honor to construe, is a legitimate,  
10 unambiguous, clear, plain Strunk & White version of the English  
11 language, and it means "and." There's just no other way to get  
12 around it. There is a presumption that the plain language, the  
13 ordinary meaning that they've offered and have put in the  
14 language controls. There's nothing to overturn that  
15 presumption, your Honor.

16 Thank you.

17 THE COURT: Not the language at least one?

18 MR. ALLAN: I'm sorry?

19 THE COURT: Not the language at least one?

20 MR. ALLAN: No. It's at least one of three different  
21 things, and it's exactly the same situation that Superguide  
22 spoke to.

23 THE COURT: Thank you.

24 Mr. Bickham.

25 MR. BICKHAM: Your Honor, just briefly regarding the

1 term "patron," ArtistShare basically acknowledges that there  
2 are two types of patrons described in the specification. And  
3 the language that they pointed to was from column 17 in the  
4 patent, and we refer to column 18. Column 17 is up on the  
5 screen, your Honor.

6 THE COURT: I can't see that far. Where are you in  
7 column 17?

8 MR. BICKHAM: Line 41, your Honor.

9 THE COURT: Okay.

10 MR. BICKHAM: So they were talking about figure 23,  
11 and in the middle of that column, around 45, it says, "upon  
12 registration, the fan, now a patron."

13 Directly across from that, in column 18 and down a  
14 little bit, down to line 54, this talks about the other kind of  
15 patron. And line 55 says, "a patron is a fan who registers  
16 with an artist and who provides monetary contribution to a  
17 project." That's the patron of the artist. So there are two  
18 kinds of patron, and that's our point. There are two kinds of  
19 patron, and the claims only refer to one kind. They don't  
20 refer to the member patron. They refer to the patron of the  
21 artist.

22 THE COURT: The patron who contributes?

23 MR. BICKHAM: The patron who contributes, yes, your  
24 Honor.

25 The claim language that they pointed to in claim 36,

1 where the patron is registered, that's after the patron has  
2 accepted the offer. That's after they've crossed the threshold  
3 and become patron No. 2, patron of the artist.

4 In claim 17, your Honor noticed that the patron has to  
5 express an interest before their information is stored. Now,  
6 that's an affirmative act. And registering, it's an  
7 affirmative act with an artist, and that's beyond mere  
8 registration.

9 THE COURT: Okay. I understand the dispute here.

10 Do you want to go on to the software-related terms  
11 now, please?

12 MR. BICKHAM: Yes, your Honor.

13 These software-related terms were added at the end of  
14 the prosecution, and they don't appear in the specification.  
15 Software tools to manage at least one project, not in the  
16 specification. Kickstarter proposes this definition. It's  
17 computer programs that do a number of things.

18 Project management software. ArtistShare has their  
19 definition. There's been some to-do made about what is the  
20 definition of a software tool. To us, that's a side issue.  
21 That's a sideshow. A software tool is a computer program.  
22 It's software. A software tool is software. And a tool, when  
23 it refers to a tool in the later claims, that's software.  
24 That's the same thing. It's a program that does something.  
25 It's not a hammer, it's not a saw. It's a tool.

1           We have a long construction here, your Honor. But we  
2 didn't come up with this. These are from the specifications,  
3 actually. We went to the claim itself. Software tools to  
4 manage a project is big. So under Phillips, you go to the  
5 specification, there's nothing. You go to the prosecution  
6 history, not in the original claims. It was inserted in May of  
7 2010. Seven years after the application was filed, it was  
8 inserted into the claims.

9           Earlier, in the prosecution, the applicant,  
10 Mr. Camelio, has already started saying that the functionality  
11 of the tools provided to the artist using the ArtistShare  
12 system, the invention, are not anticipated by the prior art.  
13 So in the December 2009 amendment, they're already equating the  
14 system with the invention. And then, after that, the invention  
15 was demonstrated to the examiner. The examiner says, Brian,  
16 that's Mr. Camelio's first name, showed a Web site,  
17 ArtistShare.com, his invention. So the invention is  
18 ArtistShare.com.

19           Mr. Camelio defined project management tools in this  
20 figure seven, and it has a number of features. And this is  
21 where we get our definition. That's the project management  
22 tools. This right here says "managed project," and these are  
23 the tools.

24           In May of 2010, he explained that to the examiner, and  
25 he says the full listing of the management tools, project

1 management tools, that are available to the artist, are set  
2 forth in figure seven under the block managed projects. That's  
3 what we just showed. It includes the ability to view 11  
4 different functionalities. Those are the things in our  
5 definition.

6 He goes on to say each of those functionalities is set  
7 forth in greater detail in figures eight through 18, and this  
8 has the same 11 functionalities. It's also under the project  
9 management box. This was used in ArtistShare's slides. Just a  
10 couple of minutes ago, it was describing the general overview  
11 of the invention, the patent. It's consistent. That's what  
12 Camelio said to the patent office. It's very clear.

13 So where the term is not in the specification and it's  
14 ambiguous, the Court has to look through the lens of the person  
15 of ordinary skill in the art. What guidance in the  
16 specification or the prosecution history does a person have to  
17 know what things are being discussed? He has the exact words.  
18 It's not a disclaimer situation. He's defining it. He's not  
19 disclaiming it. This is an affirmative definition.

20 He goes on, same page, "the specific management  
21 function, the project management tools, provided to the artist  
22 pursuant to the ArtistShare system, differentiate the instant  
23 invention from all cited prior art."

24 Your Honor, we're just taking the definition that  
25 Mr. Camelio told the examiner and told the public. So

1 ArtistShare's construction is wrong for a couple of primary  
2 reasons. First of all, they want to define software tools as  
3 computer-aided features. Software tool or a program, I don't  
4 see how that's a computer-aided feature. Feature is vague. If  
5 we tell a jury that they are to look for a computer-aided  
6 feature in the accused product, that's not going to be helpful  
7 for them. If we tell them computer program, that's helpful.

8 They turn their backs on what Camelio said as far as  
9 seven and eight are essential parts of the invention. He  
10 defined that term. We're not weaving in limitations and it's  
11 not a disclaimer. He said that's what it is. And a project,  
12 ArtistShare would have the Court define project as representing  
13 a creative work, and I don't see how a project, it may be a  
14 creative work, it's not representing a creative work. The word  
15 "project" is fairly simple.

16 Kickstarter's construction is the only one that has  
17 support in the specification.

18 THE COURT: All right.

19 MR. BICKHAM: Regarding software tools to manage  
20 communications through said patron database. Same arguments  
21 with respect to software tools, but we're not going to talk  
22 about that. But we're focusing on managed communication  
23 through said patron database. These were carefully selected  
24 words. They were put into the claim on September 7, 2010.  
25 This was the sixth amendment to the claims. This was the

1 amendment here. It was originally put into the claims in  
2 December of 2009. And it read like this, "software tools to  
3 manage communications directly to patrons."

4 Now, "directly to patrons," that's not in the issued  
5 claim. He gave up that up. He turned his back. He changed it  
6 in view of the prior art. The examiner said, Well, the prior  
7 art shows direct communications between an artist and/or  
8 creator and the public. This is not from the '887 patent.  
9 This is from a prior art patent that was discussed by the  
10 patent examiner. And this is actually part of the portion that  
11 the examiner says, there it is, interactive dialogue with Web  
12 site viewers.

13 So ultimately, in September of 2010, he makes this  
14 change in the claims. So now he takes out "directly." He adds  
15 in "through said patron database." So "directly" is gone and  
16 the communication goes through the patron database. And that's  
17 clear.

18 THE COURT: Why do you use the word "directly"? In  
19 your definition, you use the word "directly," don't you?  
20 Computer program used by the artist or account manager to  
21 enable control or exchange of information with a patron wherein  
22 the patron receives the information directly. That's at page  
23 33.

24 MR. BICKHAM: Yes, your Honor.

25 We do use that, and we use the "directly" to talk

1 about the patron database. The communication goes, going  
2 through the database means it's going through the database.  
3 It's going artist, database --

4 THE COURT: Patron?

5 MR. BICKHAM: Patron. Yes, your Honor. That's  
6 through the database.

7 THE COURT: Maybe I'm a little bit slow this morning,  
8 but you say "directly" was taken out of the patent claim?

9 MR. BICKHAM: Yes, your Honor. "Directly" was taken  
10 out.

11 THE COURT: Then you have it in here in the definition  
12 you want.

13 MR. BICKHAM: The communication, your Honor, was  
14 directly between the artist and the patron. Now, it's artist,  
15 database, patron.

16 THE COURT: Okay.

17 MR. BICKHAM: Directly through the database is  
18 different than directly to the patron, which is what was given  
19 up. And so the word "directly" might be a clumsy word in our  
20 definition, but the point is it's not going directly between  
21 the artist and the patron.

22 THE COURT: All right.

23 MR. BICKHAM: So there's more prosecution history on  
24 this. There's this Massey patent, and that's the one I just  
25 showed a moment ago.

1                   THE COURT: Yes.

2                   MR. BICKHAM: I'm not going to belabor that point.

3                   Through the patron database means directly. This addresses  
4 your Honor's point, slide 74.

5                   Moving to the next term, "software tools provided to  
6 the artist or account manager to design, create, and implement  
7 an artist-specific Web page." Again, under the Phillips  
8 instructions, we go to the claim. Software to implement the  
9 artist-specific Web page, we think, is ambiguous. We go to the  
10 specification. That's not in the specification. We go to the  
11 prosecution history and it was inserted, and we construe this  
12 as artist specific means artist specific.

13                  Computer programs used by the artist or account  
14 manager to design, create, and implement a web page. That's  
15 pretty much from the claim itself. It's from the claim itself  
16 and dedicated to the marketing of a single artist's projects.  
17 The whole patent talks about being artist specific and not  
18 project specific. And so under this definition, a Web site  
19 that is an artist-specific Web page would have one project.  
20 The artist has two projects. It would have both of them, but  
21 it's not going to have some other artist's work on their own  
22 artist-specific Web page. That defeats artist specific.

23                  The criticism here comes down to what is the artist.  
24 We look at the patent and the specification for what is the  
25 artist, and column six and column ten give us guidance. Artist

1 may be an individual of various types, or it could be other  
2 individuals. It can be an individual or it can be members of a  
3 band, a singular unit. A band is an artist. It says that  
4 right in the specification, "an entity (such as a band)."

5 Artist-specific Web page was added by amendment in  
6 December 2009. And there's discussion about how the  
7 ArtistShare system is indeed artist specific.

8 Mr. Camelio differentiated the claims to the  
9 ArtistShare system from the prior art by saying prior art is  
10 project specific. ArtistShare, in the claims, is artist  
11 specific.

12 THE COURT: What's the difference between project  
13 specific and artist specific?

14 MR. BICKHAM: I think the difference and how that's  
15 applied is if I'm an artist and I have three projects, those  
16 projects are going to be on my dedicated Web page. And if I  
17 have three projects, I'm not going to have three  
18 project-specific Web pages. So if I'm an artist who writes a  
19 song, does a movie, and something else, I'm not very creative  
20 to come up with these things.

21 THE COURT: Sculptor.

22 MR. BICKHAM: Something, yes. Those three things  
23 would go on my artist-specific Web page. They're not going to  
24 go on different project Web pages. And that's the difference.

25 THE COURT: I'm still having trouble grasping what the

1 difference is. I understand artist specific. That means I  
2 look up Mr. Smith or you, Mr. Bickham, and say what have you  
3 done. Now, if I wanted a music project, some composition of  
4 old style rock and roll, I wouldn't be able to find that? I  
5 wouldn't look on that database, I'd look for an artist? Is  
6 that the difference?

7 MR. BICKHAM: The database might or might not have  
8 that, but the claim requires providing the artist the tools to  
9 build an artist-specific Web site.

10 THE COURT: So it's an artist-specific Web site, and  
11 that excludes projects?

12 MR. BICKHAM: If the projects are done by different  
13 artists, yes.

14 THE COURT: All right.

15 MR. BICKHAM: So, again, software tools we don't think  
16 are computer-aided features, and the portion of artist specific  
17 that ArtistShare bases their construction on is based on the  
18 false premise that an artist has to be a single individual.

19 Finally, your Honor, software tools to present the "at  
20 least one project." Again, as with the other software tools,  
21 start with the claim itself. "Software tools to present a  
22 project," we believe, is ambiguous. We don't think a jury will  
23 know what that is. We go to the specification. It's not in  
24 the specification. It's not in the original claims. It was  
25 inserted by amendment. And we based our construction from

1 Mr. Camelio's own words.

2 So our position is that a person of ordinary skill in  
3 the art reading the prosecution history will know that the  
4 project, that the software tools to present the project are  
5 indeed what he said. And there's a list of features. And like  
6 the software to manage a project, these features come from the  
7 prosecution history and from the figures in the patent.

8 First of all, there's no description of Mr. Camelio  
9 saying that the ArtistShare system is the invention. We're  
10 clear about that. We looked for support in the specification  
11 for the term. The only support we could come up with for  
12 presenting the project are the figures that talk about Web  
13 pages, the project Web pages or the artist Web pages. So  
14 figure 32 has a number of features to it. And these are all  
15 under the project page, such as figure 32 of the patent, and  
16 there's a long list of things under the artist's public pages.  
17 Towards the bottom of that list is the artist's project page.  
18 The claim term is "tools to present a project." So under the  
19 project page, there are a number of different features,  
20 descriptions, listen, watch. And that's where we get our  
21 construction.

22 THE COURT: So the page headers?

23 MR. BICKHAM: Yes, sir? Yes, your Honor.

24 We've said a couple of times, and in relation to these  
25 software tools to manage projects, that they're not in the

1 specification, and your Honor doesn't have to take our word for  
2 it, although you can see it for yourself. But there's a  
3 pending application based on this same specification, the same  
4 one we're talking, the same specification we're talking about.  
5 And the patent office said a month or two ago, the examiner  
6 said "the examiner has searched the entire specification but  
7 couldn't find any description of such tools." And later, she  
8 says what are the tools. How do they work? The examiner does  
9 not know and the specification doesn't say.

10 Then, later, in the same office action, what are the  
11 tools. Each of these claims that they're talking about refers  
12 to tools. It's confusing. What are each of the tools, so  
13 we're not arguing that these statements from the examiner are  
14 to be construe the claims because, frankly, they don't give any  
15 kind of guidance on what that term means. We're using these  
16 statements to show the Court that the software tools to manage  
17 the projects aren't shown in the specification of the '887  
18 patent.

19 Now, ArtistShare says that software tools are  
20 computer-aided features -- we disagree with that -- to present  
21 a project. They say a project is representing a creative work.  
22 I think that our position is a project is not representing a  
23 creative work. It could be a creative work. But ArtistShare's  
24 construction doesn't have any support. And that's all we'll  
25 discuss on these terms for your Honor.

1 THE COURT: All right.

2 Now, what you handed up to me is Exhibit A?

3 MR. BICKHAM: Yes, your Honor. That's the joint claim  
4 construction chart that the parties submitted in October.

5 THE COURT: Okay.

6 Mr. Smith.

7 MR. SMITH: Thank you, your Honor.

8 If you have a preference for a specific order, I'll go  
9 in that order. I was going to start with the last terms.

10 THE COURT: Go ahead. Any way that you wish.

11 MR. SMITH: Thank you, your Honor.

12 THE COURT: Just point me to the charts in your book.

13 MR. SMITH: That would be great.

14 I was going to start with the tools to present the  
15 project, which is on slide 62 of our slide deck, and the reason  
16 I wanted to start here is I think this helps explain some of  
17 the problems that we have in the constructions that we're  
18 seeing from Kickstarter.

19 Primarily, what they're doing is adding in limitations  
20 that are found nowhere in the claims themselves. What are they  
21 doing? They're explicitly saying we're looking at the  
22 specification and we're taking out of the specification and  
23 putting those limitations now into the specific claims. That  
24 is clearly contrary to claim construction law, that you take  
25 something from a specification and you put it into the claims

1 themselves. And so they say that they're doing this because --

2 THE COURT: I may be wrong here, but they're saying  
3 it's in the claims. But the language of the claim is not  
4 defined by the specification because there's nothing in the  
5 specification. So they've gone to the diagrams to look for it  
6 because that's part of the patent.

7 MR. SMITH: Right. The diagrams are part of the  
8 specification, but it almost seems like there's an anomaly here  
9 because, on the one hand, they're saying it's not in the  
10 specification. On the second hand, they're saying, Here, take  
11 this from the specification and put it into the claims.

12 THE COURT: It's from the charts, isn't it?

13 MR. SMITH: That's part of it. Yes.

14 THE COURT: From your standpoint, that's part of the  
15 specification.

16 MR. SMITH: It is. There's no dispute, and you're not  
17 going to hear Kickstarter and ArtistShare argue over whether  
18 the diagrams are part of the specification. They are.

19 They're trying to put limitations into the claims that  
20 we submit just don't belong there, and here is a very clear  
21 example of what they're trying to do. There's no basis for the  
22 argument that the words "present a project," so the claim  
23 language says "tools to present at least one project," that  
24 presenting a project all of a sudden has to include all of  
25 these various different things in order to present the project.

1           In fact, they don't even define what the word  
2 "present" is. So the parties aren't disagreeing and saying,  
3 Oh, we need to construe what the word "present" is, and it  
4 doesn't seem like they're disputing what the word "project"  
5 means except that they're turning it around and saying instead  
6 of construing the word "project" we're interpreting the word  
7 "project" to now mean something different, and they now call it  
8 an artist project page.

9           So they have taken the word "project," which is  
10 clearly within the patent and in the specification, they've now  
11 taken the word "project" and changed it, and now they seem to  
12 be defining something other than what's actually in the claim  
13 language itself. That's clearly at odds with the way claim  
14 construction is supposed to happen, where you're supposed to  
15 look at the claim language itself. They're not even disputing  
16 the words "present" and "project," which are part of the claim  
17 language. Instead they're grafting new terms into the claims  
18 and then trying to construct new claims and terms that weren't  
19 there in the first place.

20           THE COURT: Can you turn to figure 32 of the '887  
21 patent?

22           MR. SMITH: Sure.

23           THE COURT: That seems to be the source for the  
24 plaintiff's definition here, but under the header "artist  
25 project page," it talks about "listen, watch, downloads,

1 personal," and so forth. What's the problem with defining it  
2 that way?

3 MR. SMITH: Because you're doing exactly what the  
4 Federal Circuit has repeatedly admonished not to do. You're  
5 taking something that is just a description of one of the  
6 embodiments in the patent and you're saying now I'm going to  
7 say that the claim, although broader than that, has to be  
8 limited to these very specific examples, when there's nothing  
9 to support that that would be the case, that to take the word  
10 "present" and now say present has to now mean eight or ten  
11 different things and throw that into the claim.

12 THE COURT: Here is the trouble that I have. You have  
13 a patent that was filed, an application that was filed in the  
14 early part of the first decade of the 21st Century. It goes on  
15 for eight or nine years, and most of it consists of the patent  
16 applicant refining his claims, narrowing his claims. Right?  
17 And now you're saying regardless of the prosecution history and  
18 the narrowing that's been engaged in, now we have to read the  
19 claims very broadly. I think that if I understand  
20 Mr. Bickham's argument, you've got to take the patent the way  
21 it was prosecuted in the office with all its limitations. You  
22 seem to be walking away from those limitations.

23 MR. SMITH: No, not at all.

24 THE COURT: You say, in figure 32, that that's just a  
25 specific embodiment and you have to read the claim. And the

1 claim you read is broader than that, correct?

2 MR. SMITH: That's correct, your Honor. There has to  
3 be a reason. You can't just say because the patent, which  
4 every patent goes through this history of back and forth with  
5 the patent examiner asking questions.

6 THE COURT: Not many go through this process for eight  
7 years, do they?

8 MR. SMITH: Oh, yes.

9 THE COURT: Really?

10 MR. SMITH: Oh, yes. The fact of the matter, as you  
11 saw from the initial slide, the patent office, I think, waited  
12 five years before actually even telling the patentee what its  
13 initial reaction to the patent was. So there was an initial  
14 like five years, nothing happened. Just because the patentee  
15 filed the patent application with the Patent & Trademark  
16 Office --

17 THE COURT: What was going on during those five years?

18 MR. SMITH: We have no insight into what goes on  
19 within the Patent & Trademark Office in D.C.

20 THE COURT: So from the time they picked up the  
21 application, three years, is not abnormal.

22 MR. SMITH: No, not at all. Patents take varying  
23 amounts of time to get through the patent office. The patent  
24 office is notoriously slow, but this history that they point  
25 out to suggest that there was something unusual, that this

1 process of back and forth is some odd thing, happens with every  
2 patent. Every patent goes back and forth. The examiner will  
3 submit a rejection. The patentee responds to it. There's a  
4 back and forth, a give and take, that takes place in every  
5 single one.

6 What's important here, your Honor, as you've pointed  
7 out, is the claims are what govern the scope of the invention.  
8 Here, they haven't pointed to anything, your Honor, where the  
9 tools to present at least one project were limited, where the  
10 patentee said to the examiner, Oh, no, our tools to present the  
11 project, those are different, that they're limited to what's in  
12 here. They haven't pointed to anything that would suggest that  
13 the patentee limited the claim in any way so that presenting  
14 now has to include very specific limitations that are found in  
15 the figure. And, in fact, they point to portions of the  
16 specification. They try to convince you that there's something  
17 in the prosecution history, but you go through it and there are  
18 portions of the prosecution history that never deal with this  
19 term. Never. So they're trying to get you to agree to take  
20 things from the specification and put them into the claims when  
21 there's no basis for doing that.

22 THE COURT: You do agree though whatever Mr. Camelio  
23 said in response to these questions raised by the patent  
24 examiner, that's part of the patent?

25 MR. SMITH: That's part of it.

1                   THE COURT: We have to read the patent against the  
2 limitations or representations that he made, whatever they  
3 were.

4                   MR. SMITH: The patent, the history that was created,  
5 as far as that back and forth, is relevant to the understanding  
6 of what the claims mean. It's part of the intrinsic record.  
7 The Federal Circuit has said it's less reliable than looking at  
8 the claims in the specification because it's ambiguous  
9 sometimes to know exactly what was going to between the  
10 examiner and the patentee. So the Federal Circuit has said  
11 prosecution history is slightly less relevant because of the  
12 ambiguities that take place, that belong there. That's why the  
13 Federal Circuit has been so clear to say the only time we're  
14 going to actually take something from the prosecution history  
15 and limit what the claims say is when there's a clear disavowal  
16 of claim scope. So we're not just going to do any statement  
17 that the patentee say all of a sudden changes the scope of the  
18 claims. No, it's not the law.

19                  The law is there has to be a clear statement that gets  
20 you a disavowal from the scope. That's why it's critical that  
21 in looking at the arguments being made, it's not just simply  
22 that the patent said this to the examiner, therefore, you  
23 don't get any of that claim scope. That's not how it works. I  
24 think here is a perfect example of Kickstarter really trying to  
25 convince you that this claim should be limited when, in fact,

1 they can't point to something that shows you where they limited  
2 that particular term.

3 It also goes against the notion that the Federal  
4 Circuit has said you don't read embodiments in the claim.  
5 Bedrock claim construction principle.

6 How to construe this term, "tools to present at least  
7 one project" are fairly clear. Kickstarter hasn't really  
8 pushed up our construction of what it means to present or what  
9 it means for there to be a project. There seems to be some  
10 dispute over what tools are, but that doesn't seem to be the  
11 focus of their argument as to what tools, features, or computer  
12 programs. In some aspects of their brief, they agree with us  
13 when we use the words "software tools" and say yes, it's  
14 computer-aided features. In other places they disagree. Today  
15 they seem to be disagreeing with us. It's not entirely clear  
16 what their position is.

17 THE COURT: What do you mean by tools?

18 MR. SMITH: Tools we take to be features.

19 THE COURT: What do you take features to mean?

20 MR. SMITH: Features could be a different things that  
21 allow a user to work with the system that is being provided.  
22 So the system is going to show you a Web page, for example.  
23 There are going to be many features on there that allow you to  
24 say you could download an image. That would be a feature.

25 THE COURT: Does tools mean anything other than

1 software?

2 MR. SMITH: I think tools can be software-related  
3 tools.

4 THE COURT: I know that. But my question was: Does  
5 it mean anything else other than software?

6 MR. SMITH: I think tools is more, I look at tools as  
7 those being those are the features that the software provides,  
8 and in other parts of the claim they call out and say software  
9 tools. So I think tools are sort of things that are going to  
10 be aided by the software that's running on the server.

11 THE COURT: What was the last part, aided?

12 MR. SMITH: Aided, meaning when you look at a  
13 particular Web page and it provides certain features to you, in  
14 order for those features to be presented to you, something has  
15 to be running on the server to present those particular  
16 features to you.

17 THE COURT: Okay.

18 MR. SMITH: So tools, just things that you can use on  
19 that Web page that will allow you to present your particular  
20 creative work.

21 THE COURT: Let me ask it one more time. How does  
22 that differ? Doesn't that mean the tools and software are  
23 synonymous?

24 MR. SMITH: I wouldn't say tools and software are  
25 synonymous. I think software tools and tools, those two terms,

1 I think, are very closely related because software tools are  
2 features that are being implemented by the software. And  
3 tools, I think, are features that are ultimately implemented by  
4 software. The claim doesn't specifically require it to be  
5 software tools, but I think at the end of the day, you're  
6 looking at the software tools that are presenting it to the  
7 user. Even though the claim doesn't use the word "software," I  
8 think you get that impression.

9                 In trying to define what is a project, Kickstarter  
10 doesn't describe what a project is. Project is described in  
11 the patent, talks about representing the creative work. We've  
12 used that as our understanding of what a project is, if project  
13 has to be defined.

14                 I've already talked about the fact that Kickstarter's  
15 trying to pull in all of these limitations from figure 32, give  
16 you one of many cites to the Federal Circuit saying that's not  
17 appropriate. And you've heard Kickstarter talk about this is  
18 just one of the embodiments of the invention, and they want to  
19 basically limit the claim to that one specific embodiment.

20                 So unless there are other questions, I was going to  
21 move on to the other software tool features.

22                 THE COURT: Yes, please.

23                 MR. SMITH: I'm going to go back to the software tools  
24 to manage. Slide 37 is the first place we have that.

25                 THE COURT: Go ahead.

1                   MR. SMITH: So here, just to frame some of the debate,  
2 there seems to be some disagreement about what software tools  
3 are. I thought, based on Kickstarter's initial briefing, that  
4 we had come to an agreement on what software tools were because  
5 in their brief they specifically say with respect to one of the  
6 claim limitations that they agree with us, they indicated they  
7 agree that software tools with respect to one of the  
8 limitations meant computer-aided features. So we thought we  
9 were in agreement and that the parties no longer needed to  
10 debate what it is to mean a software tool. I've pointed to the  
11 Kickstarter's opening brief at page 14, where they made that  
12 statement. I thought we were in agreement, but today they  
13 seemed to be saying that our definition of software tools isn't  
14 correct, which I'm not sure I can reconcile with what they say  
15 in their brief.

16                  The next portion of the claim term requires that it's  
17 software tools to manage at least one project. Here, it's  
18 unclear. Kickstarter never really defines what the word  
19 "manage" is. It seems to be just again creating limitations  
20 into the claim based again on what the specification status is,  
21 so taking something from one of the figures and saying these  
22 are the things that we're going to say the computer tools need  
23 to do, but it's unclear whether or not that's how they're  
24 defining "manage the project" or if they're not defining  
25 "manage the project" at all.

1           In our view, a project, in our view, the notion of  
2 managing the project is clear. It's just managing at least one  
3 description of a creative work. Again, this goes back to the  
4 notion of what is a project. Kickstarter doesn't seem to be  
5 defining what a project is, and so if it does need to get  
6 defined, we propose it be defined in this manner.

7           Specification supports the notion of a project being a  
8 creative work or representing a creative work. Kickstarter,  
9 like the other claim term that we're talking about, tools to  
10 present, here, Kickstarter takes the figure seven and indicates  
11 that everything that you see in the figure seven should now be  
12 read into the claims when it talks about managing a project.  
13 Again, this would be the exception, not the rule, to claim  
14 construction, where you would be taking an embodiment and  
15 reading that embodiment directly into the claims. The patent  
16 history is specific that the embodiment of the claim is just  
17 one example. They're not intended to be limiting in the  
18 claims.

19           Kickstarter spends a lot of time arguing about the  
20 prosecution history relating to managing at least one project.  
21 Again, in order for them to satisfy what would be required in  
22 order to say that there was some disavowal, you need some  
23 unambiguous, clear disavowal. Again, I don't think they ever  
24 present to you anything that suggests that there was a  
25 disavowal of claim scope. What they do is they point to

1 several portions of the prosecution history where what is  
2 happening is the patent examiner has found some prior art  
3 references that are dealing with systems that are looking at  
4 how an artist interacts with a recording studio or something  
5 similar to a recording studio.

6 You may remember at the beginning of the presentation  
7 I was talking about how some of the problems different artists  
8 are dealing with recording studios and recording companies, and  
9 in each case the patentee was continuing to remind the  
10 examiner, No, our invention is different. We're talking here  
11 about what you can do where the fans or the fans or patrons can  
12 be able to help an artist, we're different from these recording  
13 and distribution companies that you're seeing in the prior art,  
14 and clearly started to distinguish that. And they point to and  
15 they say, Well, no, no, they said there are some unique  
16 software tools, and what they do is they take every single one  
17 of those and say we should read those into the claims. But the  
18 patentee never said every single one of these tools is required  
19 in order for us to distinguish the prior art.

20 No. They don't even mention the specific tools. They  
21 just say there are software tools. This is one of the benefits  
22 of our invention. It allows artists to now have these tools  
23 that allow them to manage their projects. So now they're not  
24 relying on a recording company or a production company to go do  
25 that for them. Now they're going to do it; they're in control.

1 And that was the important distinction they were making to the  
2 patent examiner. It wasn't this notion that, Oh, we need a  
3 list of 15 software tools in order to distinguish the prior  
4 art. They never said it, and it wouldn't make sense that they  
5 would list out eight or ten specific tools that would be  
6 required.

7 What Kickstarter says is they referred to the fact  
8 that there were tools, and, if you look at the figure, we can  
9 see where the tools are, so let's take those tools and put them  
10 into the claim. And I submit that's just not the right way to  
11 construe the claims.

12 THE COURT: All right.

13 MR. SMITH: I'm going to move on, your Honor, to  
14 software tools to manage communications to the patron database.

15 THE COURT: Yes.

16 MR. SMITH: This starts at slide 33 of our slide deck.  
17 Here, again, we have software tools. I'm not going to repeat  
18 the argument.

19 First of all, software tools, I thought we were in  
20 agreement what software tools meant. Manage communications, we  
21 have a little bit of debate as to what manage communications  
22 means. We interpret manage communications to enable and/or  
23 facilitate the exchange of information. They require that it  
24 must enable and control the exchange of information. We don't  
25 think it's that limiting, and then through the patron database,

1 we interpret to mean with the aid of the patron database. They  
2 require that somehow the information comes correctly from the  
3 patron database, which we submit isn't supported by the claims  
4 themselves, let alone by the specification.

5 THE COURT: Mr. Bickham, I thought we got rid of the  
6 word "directly" and you were through the database.

7 MR. BICKHAM: Yes, your Honor.

8 THE COURT: Is this an error here when Mr. Smith puts  
9 out your Kickstarter proposal because it says "directly from  
10 the patron database"?

11 MR. BICKHAM: Your Honor, the claim removed "directly"  
12 and changed and put in its place "through the database. Our  
13 construction here is correct, that our position is that the  
14 communications need to go artist, database, patron.

15 THE COURT: Where do you, in your stack of charts,  
16 deal with this issue of whether it's through or directly? We  
17 just discussed it. Page 33, chart 66?

18 MR. BICKHAM: Yes. Yes, your Honor. And the point,  
19 your Honor, was not directly to the patrons between the artist.  
20 That was the point that we were making in discussing it.

21 THE COURT: I see.

22 MR. BICKHAM: So the term should not be construed as  
23 communications, artist directly to patrons. It's  
24 communications, artist, database, patron.

25 THE COURT: Go ahead, Mr. Smith.

1                   MR. SMITH: Just to pick up on that term, how the  
2 communications come, they're adding these new limitations into  
3 the claims that aren't part of nearly the language that just  
4 requires managing communications through said patron database.  
5 The language is "managing communications through said patron  
6 database." Now they're requiring certain things that  
7 specifically happen. You have to both enable and control the  
8 exchange of information, and now somehow, it's unclear how,  
9 that the communications are coming directly from the database  
10 to the patron. It's unclear exactly how that would work or  
11 where they would find any support in the patent that would  
12 suggest that this information is coming directly from the  
13 patron database.

14                   In fact, if you look at claims 17 and 32, which I will  
15 put up, 17 is up there now. Here, if you look at what it says  
16 when it talks about managing communications to the patron  
17 database, at about line 34, on claim 17, it says "managing  
18 communications through said patron database from the artist or  
19 account manager to patrons." So, again, the exact language  
20 from the claim suggests that communications are coming from the  
21 artist to the patron. So there's direct communication between  
22 those two entities. And we again say "through said patron  
23 database" just means that the patron database has information  
24 that allows the artist to communicate with the patron because  
25 the database, as we discussed earlier, can have contact

1 information for the specific patrons. So it's not that the  
2 database is sending its own information to patrons. It's that  
3 the artist is able to send communications to the patrons using  
4 the patron database because the patron database has this  
5 contact information that allows it to do that.

6 Claim 36, I'll submit, has the same or similar  
7 language to that in terms of noticing that the managing  
8 communications are from the artist or account manager to the  
9 patrons.

10 THE COURT: All right.

11 MR. SMITH: Here, looking at what are some of the  
12 differences we're seeing here, the specification from the  
13 patent itself talks specifically about communicating. It talks  
14 about being able to have mailing list drop down, export names.  
15 All of these things allow the artist to communicate with the  
16 patrons, but it doesn't suggest that the database is  
17 communicating directly with patrons. No.

18 What it's calling out is the notion that the artist  
19 can get that information from the database and then use it to  
20 send communications to the patrons. But there's nothing in the  
21 patent that I've been able to find that would suggest that the  
22 database is sending communications directly to patrons. I  
23 don't think that would make any sense, but I haven't found  
24 anything that would suggest that would be the case.

25 Kickstarter, like in some of its other arguments,

1 relies heavily on the prosecution history, suggesting that  
2 somehow ArtistShare disclaimed communications that would go  
3 directly to patrons. I don't think that would make sense in  
4 the light of the way claims are written, where you're managing  
5 communications that are going from artist to patron. But even  
6 so, if you look at the actual language of the prosecution  
7 history that they cite to, and here on I'm on slide 47 of our  
8 slide deck, again, what they're distinguishing isn't  
9 communications through a patron database. What they're  
10 distinguishing is the notion that it's different from what  
11 production companies do, which is the production companies are  
12 the ones that always communicated with the outside world. The  
13 artists had no control over it.

14 Here, in the system that was described by the  
15 patentee, here, you now have the artists being able to manage  
16 communications with the patrons, and so that's what they're  
17 really talking about, this notion that you can now manage  
18 communications with your own patrons, which is interesting and  
19 different. It's not this notion that now the words "through a  
20 patron database" was used. In fact, if you looked at  
21 Kickstarter's argument, the argument suggests that by removing  
22 the word "directly" we somehow narrowed the claims, which would  
23 be a little counterintuitive because if you remove a word from  
24 a claim, technically the understanding is you've broadened the  
25 claim, not narrowed it. But there is nothing in the

1 prosecution history that suggests that "directly" was somehow a  
2 problem and that we had to change it to through a patron  
3 database.

4 In fact, the portion that Kickstarter cites to where  
5 they say, Oh, the examiner rejected some of the limitations by  
6 saying that this prior art patent communicates directly with a  
7 patron, the patentee said, No way, I disagree completely. The  
8 prior does not disclose communicating directly with the patron.  
9 What it does disclose is the production company communicating  
10 with these people who are interested or purchasing things. It  
11 has nothing to do with the notion --

12 THE COURT: So the dropping of the word "directly"  
13 means what?

14 MR. SMITH: I think they just changed the language.

15 THE COURT: Clearly, they changed the language. But  
16 what does it mean? Does it have any meaning at all?

17 MR. SMITH: I don't think removing the word "directly"  
18 has any meaning at all because they still kept that you're  
19 communicating from the artist to the patron.

20 THE COURT: And that to you is the important modality  
21 here?

22 MR. SMITH: That's right, your Honor.

23 THE COURT: You've eliminated the record company as  
24 the entity in between the artist and the fan/patron.

25 MR. SMITH: That's exactly right, your Honor. And you

1 can see this throughout the prosecution history over and over  
2 again where the patentee says, We're different from these guys  
3 because we're letting the artists communicate and manage those  
4 communications. And how are they doing it, because we've  
5 created this database that allows that.

6 THE COURT: And the Massey patent deals with what?

7 MR. SMITH: So the Massey patent has to do with, you  
8 could have ownership that you could get in particular rights in  
9 a creative work, let's say a record or something. So what  
10 they're talking about is the notion that you could give away  
11 some of your ownership rights in order to get what you want,  
12 and Massey was really talking about having some ability for the  
13 production company to be able to talk to the people who are  
14 interested in the artist's work but not the artist  
15 communicating with the interested people. And they put up a  
16 slide that they suggest says, Oh, no, Massey also includes that  
17 because it says an interactive Web site. But what they don't  
18 tell you is that nowhere does it say the artist is interacting  
19 with anyone like a fan or a patron. In fact, the  
20 communications are all centered on the production company being  
21 able to communicate with the fans or the patrons.

22 THE COURT: Okay.

23 MR. SMITH: I'm just going to move through some of the  
24 differences between what Kickstarter's recommending and what  
25 we're recommending.

Again, they're requiring that now it has to be that the programs have to be used by the artist when the claim just says you're providing software tools. It doesn't say that the artist has to use them in order for the claims to be satisfied, and then also requires that you have to enable and control the communications and that the patron receives information directly from the database. All three of those are new limitations, which the only way they get there is by grafting on new limitations that are really not found in the claims at all.

I was going to move on to artist-specific Web page, if that's all right.

THE COURT: Yes.

MR. SMITH: So artist-specific Web page was part of a larger claim term that Kickstarter asked to construe. That was a claim term that talked about, again, tools relating to the artist-specific Web page. It seems like we're at the point where the parties agree on most of the definitions. It says, "artist agrees with Kickstarter's construction for its limitation," and our construction was "computer-aided features to design, create, and implement an artist-specific Web page." It seems like that portion is no longer in dispute. There is no issue about it. This is the portion we cite to you, by the way, where we thought we were in agreement with Kickstarter about what the words "software tools" mean, but for this

1 specific limitation, really the focus --

2 THE COURT: Let me interrupt here.

3 Mr. Bickham, is this right, that you're now agreeing?

4 MR. BICKHAM: Mr. Smith has said about six times, he's  
5 referred to this line in our brief, that line is in our brief,  
6 but if we're not in agreement, the position is still what our  
7 position is in the joint claim construction chart submitted to  
8 your Honor and argued in our papers. That line was intended to  
9 convey that the dispute is on what is artist specific because  
10 originally, artist specific was --

11 THE COURT: Tell me what the difference is between  
12 ArtistShare's proposed construction, "one or more Web pages  
13 relating to one or more artists," and your definition, "a Web  
14 page that is dedicated to the marketing of a single artist's  
15 profits."

16 What's the difference?

17 MR. BICKHAM: Under ArtistShare's construction, your  
18 Honor, they can have more than one artist on a Web page.

19 THE COURT: Is that right, Mr. Smith?

20 MR. SMITH: No, your Honor. I think we're actually in  
21 agreement on this portion. I don't want to say complete  
22 agreement, because there is a distinction here. I think the  
23 point where we're talking about this issue of where there's  
24 agreement, actually, is the claim language that preceded  
25 artist-specific Web page. And it's the language, it's in our

1 footnote. I'm sorry. I don't know if I can make it any larger  
2 for you to read, but the footnote is from Kickstarter's brief  
3 where it says --

4 MR. BICKHAM: Your Honor, we've admitted that that  
5 line is in the brief, and we've said what the intent behind  
6 that is and that our position hasn't changed. I don't know if  
7 we need to have it said eight or nine times now.

8 MR. SMITH: Your Honor, I was just trying to make sure  
9 you understood where there is a dispute and where there isn't a  
10 dispute.

11 THE COURT: Actually, my question is very simple now.  
12 We have language from ArtistShare and we have language from  
13 Kickstarter, and I'm asking what the difference is. I know  
14 there are different words, but when you get down to the  
15 different words, what's the difference? It's got to be  
16 meaningful to a jury.

17 MR. SMITH: Right, your Honor.

18 THE COURT: That's the whole purpose of a Markman  
19 hearing, what am I telling the jury as between Kickstarter's  
20 proposal and ArtistShare's proposal. I understand there is  
21 different language.

22 MR. SMITH: I think that there is a difference,  
23 meaning when we first proposed these constructions, there was a  
24 concern that when Kickstarter uses the word "single artist's  
25 projects," is it referring to a single person, or can it be a

1 band or an entity? And from the conversation that you had  
2 today with Kickstarter's counsel, it seems to be that we're in  
3 agreement that an artist is broader than just a single  
4 individual. An artist could be multiple individuals. It could  
5 be a band, it could be a collection of people, and those would  
6 all be considered an artist, and I think that's totally fine.  
7 And I think Kickstarter agrees with that, which was one of our  
8 bones of contention which is what we thought they were trying  
9 to do by using the words "single artist" to suggest that it  
10 couldn't be what the patent says an artist is but was more  
11 narrowly tailored to something different.

12 I think based on today we're pretty close to what an  
13 artist means.

14 THE COURT: Mr. Bickham.

15 MR. BICKHAM: Your Honor, the problem here is in  
16 ArtistShare's definition as to one or more artists. Artist in  
17 the patent, in the specification, is described as an individual  
18 or a collective band, or something like that.

19 THE COURT: I understood Mr. Smith to say, and maybe I  
20 got it wrong, that the artist could have one or more projects,  
21 but the projects were always identified with a particular  
22 artist. You wouldn't have projects from an artist identified  
23 separately as projects and you wouldn't have the projects where  
24 one particular artist is shown on the Web page of another  
25 artist. Do I have that right?

1                   Mr. Smith.

2                   MR. BICKHAM: I believe --

3                   MR. SMITH: I'm sorry. I thought you were asking a  
4 question.

5                   THE COURT: I know you were paying attention.

6                   MR. SMITH: Most of that is right, your Honor, whereas  
7 you can have --

8                   THE COURT: You always qualify. You say most of it's  
9 right.

10                  MR. SMITH: I just want to clarify. If I say yes,  
11 it's right, we move on, and it's the clarification that never  
12 makes it in.

13                  The point I want to clarify is, in our definition, the  
14 Web page could have multiple Web pages to it, meaning that you  
15 could have one project listed on one page and another project  
16 listed on another page.

17                  THE COURT: It would always be artist specific.

18                  MR. SMITH: It would. It would always be artist  
19 specific. That's right.

20                  THE COURT: Say you're an artist, you could have  
21 multiple projects described on various Web pages, correct?

22                  MR. SMITH: Correct.

23                  THE COURT: That would not include the artist of  
24 Mr. Bickham.

25                  MR. BICKHAM: Not unless he cooperated with me and we

1 worked together.

2 THE COURT: Don't give me that. He's a separate  
3 artist.

4 MR. SMITH: If he's separate, then it wouldn't.

5 THE COURT: Now what's the difference, Mr. Bickham?

6 MR. BICKHAM: With that, I think we're in agreement,  
7 your Honor.

8 THE COURT: All right.

9 MR. BICKHAM: And the only difference -- well, we're  
10 in agreement on this. And then the only difference is software  
11 tools, is it a feature or is it a computer program.

12 THE COURT: All right. Thank you.

13 Mr. Smith, go ahead.

14 MR. SMITH: Like I said, based on what I've heard  
15 today, it sounds like we're pretty much in agreement what an  
16 artist means and we're in agreement that the artist can have  
17 one project or multiple projects, but as long as they're artist  
18 specific, that would be covered.

19 THE COURT: Page 51, we're not defining the word  
20 "artist," are we?

21 MR. SMITH: I don't think we need to, your Honor. But  
22 initially when we first saw the definitions that were coming  
23 through, we thought that there was a dispute as to what an  
24 artist is. I think we just want to make sure it's clear that  
25 an artist can be a single individual or multiple individuals?

1 That's all we want to make sure is clear, and I think you heard  
2 today that is.

3 THE COURT: Multiple individuals, as long as they're  
4 collaborating on a work of art?

5 MR. SMITH: Correct, your Honor.

6 THE COURT: There's got to be some unifying force to  
7 these multiple individuals?

8 MR. SMITH: That's right, your Honor.

9 THE COURT: What else?

10 MR. SMITH: I think the only other thing was, I think  
11 we've resolved it, but I want to make sure. In their  
12 definition they refer to projects, plural, that it has to be  
13 more than one project. But I thought today heard there could  
14 be one or more projects. But with that I think we're in  
15 agreement with the artist-specific Web page.

16 THE COURT: You agree an artist can have one project?

17 MR. BICKHAM: Yes, your Honor.

18 THE COURT: One of the records I have at home is One  
19 Hit Wonders.

20 MR. BICKHAM: Then they would have artist-specific Web  
21 sites with their One Hit Wonder. But if they got a two hit  
22 wonder, that would be all on one web site for that artist.

23 THE COURT: Might or might not be.

24 MR. SMITH: You could have multiple Web pages, and  
25 that would still be artist specific.

1                   THE COURT: Only one artist, but you could have  
2 multiple projects. Consider Picasso, he could have a page, as  
3 I understand it, for pictures of his work, sketches of his  
4 work, drawings of his work, early works, later works. They  
5 could be on separate web pages, but they would all be listed  
6 under Picasso.

7                   MR. BICKHAM: Yes, your Honor. And Mr. Picasso would  
8 be central to all of the Web pages.

9                   THE COURT: Yes, correct. He would be the dominating  
10 feature. He'd be the artist. This would be artist specific.

11                  MR. BICKHAM: Yes, your Honor.

12                  THE COURT: Anything else, Mr. Smith?

13                  MR. SMITH: Nothing else, your Honor.

14                  THE COURT: Mr. Bickham and Mr. Allan, do you want to  
15 respond?

16                  MR. BICKHAM: Just very briefly, your Honor.

17                  THE COURT: Yes.

18                  MR. BICKHAM: What we are doing with these software  
19 tools terms, we're not trying to read limitations into the  
20 software claims. Phillips tells us to look at the claim  
21 language through the lens of the person of ordinary skill in  
22 the art. So looking at the intrinsic evidence that's before  
23 him, the file history, the specification, and the claims, what  
24 would a person of skill in the art be drawn to to have any kind  
25 of definition for these terms that are not in the

1 specification? They're not in there, so he has to go into the  
2 prosecution history. What is this term?

3                   The prosecution history says the project management is  
4 at figure seven. Project management is at figure eight. Those  
5 two figures show the same thing. And so the term is being  
6 interpreted, and ArtistShare says that Mr. Camelio is a person  
7 of skill in the art. We might have a dispute about that down  
8 the road, or not, so if that's how he's interpreting the  
9 software management features, and he's telling the patent  
10 office that it's those features in figure seven and figure  
11 eight that distinguish from the prior art, a person of skill in  
12 the art's going to see that, and he's going to say, All right,  
13 there it is.

14                  THE COURT: Isn't a person who gets a patent always  
15 skilled in the art? I mean, I thought one of the definitions,  
16 as I recall it, you have a college-educated person who is the  
17 computer programmer, and Mr. Camelio was not college educated;  
18 he's self-taught. So you would say that Mr. Camelio was not  
19 one skilled in the art because he didn't meet the  
20 qualifications?

21                  MR. BICKHAM: I think that we haven't had a chance to  
22 depose Mr. Camelio. The Markman hearing is the very beginning  
23 of the case.

24                  THE COURT: I understand.

25                  MR. BICKHAM: So we haven't fully vetted what the

1 person of ordinary skill in the art is. We thought we set an  
2 appropriate level, but what ArtistShare has done, they've said  
3 here's the level, Mr. Camelio's in it. And they should be held  
4 to it. That's his interpretation, the prosecution history has  
5 his interpretation of these claim terms. And so we're not  
6 adding limitations to the specification. The cases like Kara  
7 Tech are different than these, than what's happening here.

8 In Kara Tech, there were two types of claims. One  
9 type of claim required a certain feature. The other type of  
10 claim did not require the feature. The second type of claims  
11 were being asserted, and there is a Markman hearing and claim  
12 construction on that second type of claim.

13 The District Court said that the feature from the  
14 first set of claims, which was absent from the second, needed  
15 to be in the second, and the Federal Circuit said no, that's  
16 not right. That's reading a limitation that's not there. That  
17 was taking a whole new limitation and putting it in. What  
18 we're doing is we're interpreting the claims, and I think we're  
19 giving these claims the only interpretation that is supported  
20 by the specification or the file history.

21 THE COURT: All right. Thank you very much. I hope  
22 to get this decision out to you shortly. When we do that,  
23 we'll have a conference and plan the next steps. Thank you  
24 very much.

25 MR. ALLAN: Thank you, your Honor.

1 MR. SMITH: Thank you, your Honor.

2 MR. BICKHAM: Thank you, your Honor.

3 THE COURT: I'd like to have the benefit of the  
4 transcript when I turn to this, so would somebody order a copy  
5 of the transcript.

6 Thank you very much.

7 (Proceedings adjourned)

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